SUPREME COURT OF THE UNITED STATES.

No. ~~108~~ 114.

EDWARD KELLY AND HUGH MAHER, PLAINTIFFS IN ERROR,

vs.

LEMUEL CRAWFORD, DAVID M. CROSS, AND HENRY B. PAYNE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 198.

EDWARD KELLY AND HUGH MAHER, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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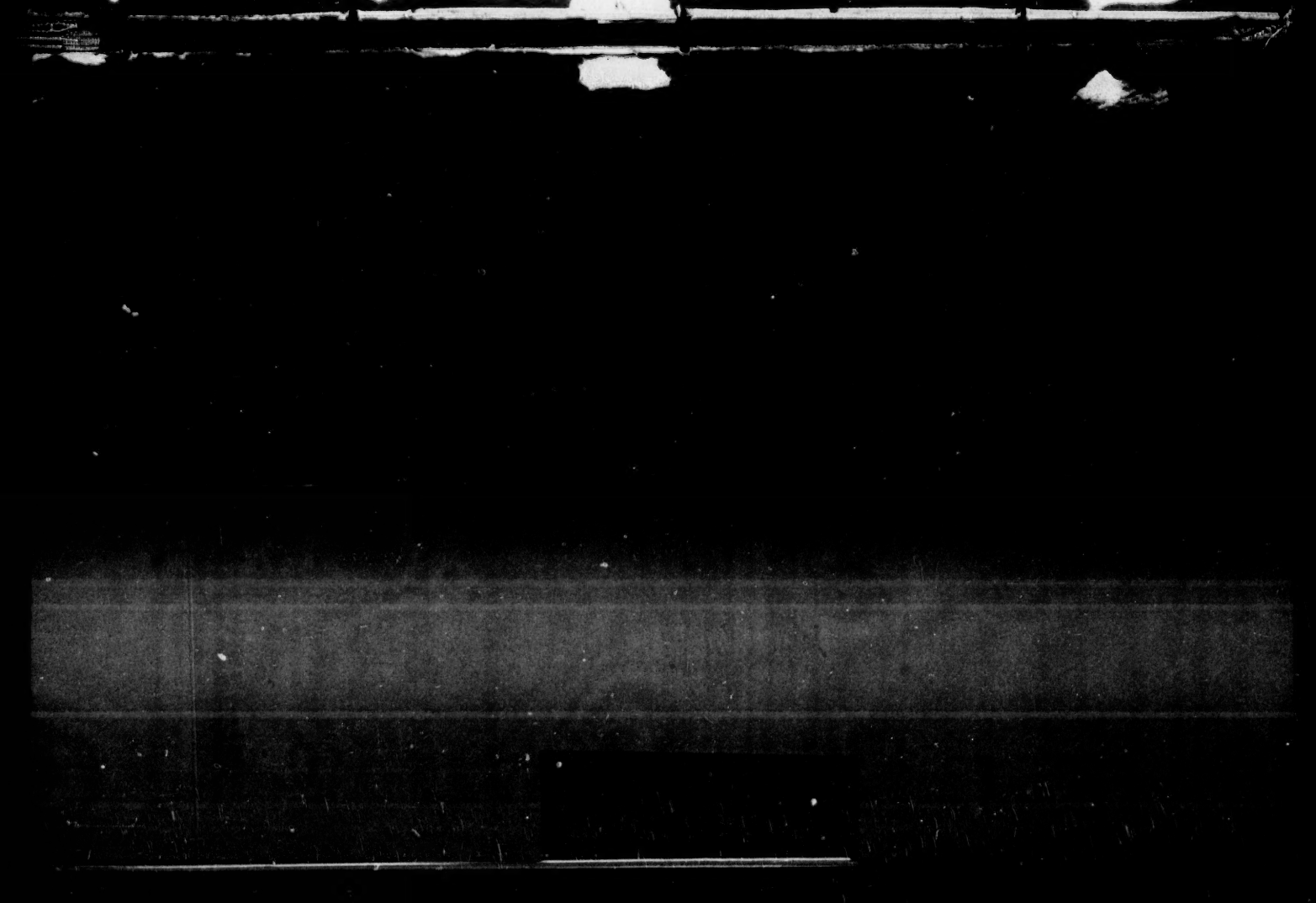

SUPREME COURT OF THE UNITED STATES.

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vs.

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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, held at the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro tempore of the Hon. David Davis, one of the judges of the Supreme Court of the United States of America, sole judge of said circuit court, on Wednesday, the thirteenth day of April, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth.

WM. H. BRADLEY, *Clerk.*

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLEY AND HUGH MAHER.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the eighteenth day of September, in the
2 year of our Lord one thousand eight hundred and sixty-two, came said plaintiffs, by Henry S. Monroe, esq, their attorney, and filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their præcipe praying for the issue of a writ of summons against said defendants in a plea of trespass on the case upon promises, to the damage of the plaintiffs of ten thousand dollars, returnable on the first Monday of October, in the adjourned October term of said court, A. D. eighteen hundred and sixty-two, and also at the same time filed their bond for costs; which said bond for costs and said præcipe are in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Circuit court, October term, A. D. 1862.

LEMUEL CRAWFORD *et al.*
vs.
EDWARD KELLEY *et al.*
In assumpsit.

I do enter myself security for costs in this cause, and promise to
3 pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by the pl'ffs, hereby agree and stipulate that execution may issue against my property for any costs taxed against the plaintiffs.

Dated this 18th day of September, A. D. 1862.

HENRY S. MONROE.

Endorsed: Filed Sept. 18th, A. D. 1862.

WM. H. BRADLEY, *Clerk.*

Præcipe.

Circuit court of the United States, northern district of Illinois.

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLEY AND HUGH MAHER.
Assumpsit. Damages $10,000 00.

The clerk will please issue summons in the above-entitled cause,
4 returnable at the next term of this court.

H. S. MONROE, *Att'y for Pl'ffs.*

Sept. 18, 1862.

Endorsed: Filed Sept. 18, 1862.

WM. H. BRADLEY, *Clk.*

And thereupon, on the same day, to wit, the eighteenth day of September, A. D. 1862, a writ of summons was issued out of said clerk's office against said defendants in the plea aforesaid; which said writ, together with the return of the marshal thereon endorsed, are in the words and figures following, to wit:

Circuit court of the United States of America.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Edward Kelley and Hugh Maher, if they shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illi-
5 nois at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Lemuel Crawford, David W. Cross, and Henry B. Payne, in a plea of trespass on the case upon promises, to their damage, as they allege, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Chicago aforesaid, this eighteenth day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the 87th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Marshal's return.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents that I have appointed, and by these presents do appoint, W. E. Johnson my true and lawful deputy to execute the annexed writ, (Lemuel Crawford, David W. Cross, and Henry B. Payne *vs.* Hugh Maher and Edward Kelley,) and to make true return thereon according to law.

[SEAL.] J. R. JONES,
United States Marshal of the Northern District of Illinois.

6 I have served the within summons upon Hugh Maher and Edward Kelley therein named in manner following, to wit, by reading the same to and in the presence and hearing of the said Maher on the 24th day of September, A. D. 1862, and by reading the same to and in the presence and hearing of the said Kelley on the 1st day of October, A. D. 1862.

J. R. JONES, *U. S. Marshal,*
By W. E. JOHNSON, *Special Deputy.*

Endorsed: Filed April 6, A. D. 1864.

WM. H. BRADLEY, *Clerk.*

On this day, to wit, the twenty-third day of September, A. D. 1862, came the said plaintiffs, by their attorney, and filed in said clerk's office their declaration against said defendants, which is in the words and figures following, to wit:

Circuit court of the United States, northern district of Illinois, October term, 1862.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

7 Lemuel Crawford, David W. Cross, and Henry B. Payne, who are citizens of the State of Ohio, doing business under the name, style, and firm of Crawford, Cross & Co., by Henry S. Monroe, their attorney, com-

plain of Edward Kelley and Hugh Maher, who are citizens of the State and northern district of Illinois, defendants in this suit, who have been duly summoned in an action of assumpsit, for that whereas, heretofore, to wit, on thirteenth day of September, eighteen hundred and sixty-one, at the city of Chicago, to wit, in the northern district of Illinois, the said defendants, under the name, style, and firm of Kelley & Co., entered into an agreement, in writing, with the said plaintiffs, which is in the words and figures following, to wit:

Know all men by these presents that whereas Kelley & Co., of Chicago, Illinois, are justly indebted to Crawford Cross & Co., of Cleveland, Ohio, in the sum of from four to six thousand dollars upon joint account, the exact amount to be ascertained from the books of said Kelley & Co., by one George H. Quigg, under the supervision of the parties to this agreement, and
8 that the amount so found to be due and owing to be final, and in consideration of such indebtedness and the further consideration that said Crawford, Cross & Co. agree not to sue said Kelley & Co. upon such indebtedness before the 13th day of June, A. D. 1862, unless one of the firm of said Kelley & Co. shall remove out of this State, we, the said Kelley & Co., do hereby grant, bargain, and sell, assign, transfer, and set over unto the said Crawford, Cross & Co. all the accounts hereunto attached and marked "Exhibit A," together with two wheelbarrow scales, one six-tons Duryea & Forsyth's scales, three coal carts, four coal screens, one office desk, and all other accounts due and owing to said Kelley & Co., upon their coal books, except the accounts now enjoined in chancery, which said chancery suit is now pending. It is further agreed by the parties hereto that the said Crawford, Cross & Payne are to put the said accounts and each of them into speedy collection and use all reasonable due dilligence to collect the amounts found to be due on each and all of said accounts as far as the same can be
9 done; and after paying the expenses of collecting said moneys, the balance so collected shall be applied to the extinguishment of the indebtedness of said Kelley & Co. to Crawford, Cross & Co., as ascertained by the aforesaid George H. Quigg. It being distinctly understood that the said Quigg is to ascertain the amount due, to which the parties hereto now agree is to be the actual amount and the sum so intended to be secured by the sale and transfer of the accounts and property herein mentioned. Should there be any balance left after collecting the sums herein referred to, the said Crawford, Cross & Co. agree to pay the same by their agents or attorneys over to Kelley & Co., and should the said sum of accounts and the personal property herein referred to be insufficient to pay the sum found (hereafter) to be due to Crawford, Cross & Co., then and in that case the said Kelley & Co. agree to pay the balance remaining unpaid to the said Crawford, Cross & Co. It is further agreed by the parties hereto that Messrs. Drummond & Ford, attorneys, of Chicago, are to superintend the collection of said accounts, and the sale of the personal property hereby and herein transferred to the
10 said Crawford, Cross & Co., and for such purpose are to have the custody and control of said books of Kelley & Co. and the said accounts, for which services they are to receive the usual rate of per cent. for collections and the usual fees in case of litigated suits.

In witness whereof, we hereunto set our hands, as also to a duplicate, this 13th day of September, A. D. 1861, at Chicago, Illinois.

CRAWFORD, CROSS & CO.
KELLEY & CO.

In and by which agreement the said defendants, in consideration of the indebtedness mentioned in said agreement, as due from the said defendants to the said plaintiffs, and in consideration that said plaintiffs agreed not

to sue said defendants upon said indebtedness before the thirteenth day of June, 1862, promised and agreed to submit the exact amount due from said defendants to the plaintiffs to the decision of one George H. Quigg, he to ascertain said amount from the books of said defendants, and also that the amount so found to be due to the plaintiffs from the defendants by
11 said Quigg should be final, and also the said defendants promised and agreed to pay to the said plaintiffs the balance of the amount found to be due by said Quigg, which should remain unpaid after deducting the amount received by said plaintiffs from the avails of said accounts and sales of said personal propery. And said plaintiffs aver that said Quigg did under the supervision of said defendants ascertain from the books of said Kelley & Co., defendants, the amount due from the defendants to the plaintiffs, and fixed said sum at the amount of fifty-four hundred and seventy-four dollars and thirty-four cents, of which the said defendants had notice, to wit, at the time and place aforesaid. [And the said plaintiffs aver that heretofore, to wit, on the day of A. D. 186 , at Chicago, in said northern district of Illinois, the said Drummond & Ford proceeded to sell said personal property, and to put into speedy collection each and every of said accounts, and did then and there sell said personal property, and dilligently did seek to collect said accounts, except such as were enjoined in chancery; and the plaintiffs aver that the proceeds of said sales of personal property
12 and of said collections amounted to a small sum, to wit, the sum of five hundred dollars, and that the usual fees of collection, to wit, the usual fees of attorneys for collecting said sum, was a large sum, to wit, the sum of two hundred dollars, and that the said accounts not collected were and are worthless. And the plaintiffs further aver that said personal property and said accounts were then and there insufficient to pay the aforesaid sum found to be due and owing from said defendants to said plaintiffs. And the said plaintiffs further aver that they did not sue said defendants before the thirteenth day of June, 1862; and further, that the said plaintiffs in all respects, performed and fulfilled their part of said contract by allowing said Drummond & Ford, and by urging upon them the dilligent collection of said accounts, and a speedy, careful, and honest sale of said personal property. And the said plaintiffs aver that they delivered into the control and custody of said Drummond & Ford said personal property, said books of account, and said accounts. And the said plaintiffs aver that after-
13 wards, to wit, on the day and year aforesaid, at the place aforesaid, they applied the proceeds of said sale of personal property and collection of said accounts to the extinguishment of the debt of said defendants to said plaintiffs. And the said plaintiffs aver that over and above the said sum, so as aforesaid applied in extinguishment, there remains due and unpaid of the sum so as aforesaid found to be due and owing by said Quigg from said defendants to said plaintiffs, to wit, the sum of ten thousand dollars. Yet the said plaintiffs aver that said defendants have not paid said sum, although often requested so to do. And for that, whereas, also, the said defendants afterwards, to wit, on the day and year last aforesaid, at Chicago, to wit, in the northern district of Illinois, were indebted to the said plaintiffs, in the further sum of ten thousand dollars for divers goods, wares, and merchandise, chattels and Briar Hill and Chippewa coal by said plaintiffs before that time sold and delivered to the said defendants at their special
14 instance and request, and being so indebted, the said defendants, in consideration thereof, afterwards, to wit, in the day and year last aforesaid, to wit, at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said last-mentioned sum of money, when they should be thereunto requested.]

And whereas, also, the said defendants afterwards, to wit, on the first day of September, in the year of our Lord one thousand eight hundred and sixty-two, at the place aforesaid, were indebted to the said plaintiffs in the sum of ten thousand dollars, lawful money of the United States of America, for so much money before that time lent and advanced by said plaintiffs to the said defendants, and at the special instance and request of the said defendants, and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendants, and at the like request of the said defendants, and for other money by the said defendants before that time had and received to and for the use of the said plaintiffs; and being so in-
15 debted the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiffs in the further sum of ten thousand dollars, of like lawful money as aforesaid, and being so found in arrear and indebted to the said plaintiffs, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid and at the place aforesaid,
16 undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendants (although often requested, &c., to wit, on the day when the said note became due and payable, according to the tenor and effect thereof, and oftentimes since, to wit, at the place aforesaid) have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiffs of ten thousand dollars. And therefore the said plaintiffs bring suit, &c.

HENRY S. MONROE, *Att'y for Pl'ffs*

The portion in brackets is an additional count, filed under leave of court given July 28, 1863. Filed Aug. 13, 1863.

W. H. BRADLEY, *Clk.*

Messrs. Kelly & Co. to Crawford, Cross & Co., Dr.

To money lent and advanced		$10, 000
	To money had and received	10, 000
17	To money due on account	10, 000
	To Briar Hill and Chippewa coal sold and delivered	10, 000

Endorsed: Filed September 23d, 1862.

WM. H. BRADLEY, *Clk.*

On this day, to wit, the eighth day of October, A. D. 1862, came the said defendant Hugh Maher, by D. C. & I. J. Nichols, his attorneys, and filed in said clerk's office, in said entitled cause, his plea in abatement, which is in the words and figures following, to wit:

In the circuit court of the United States for the northern district of Illinois, October term, A. D. 1862.

HUGH MAHER, IMPLEADED WITH EDWARD KELLEY, *ads.* LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE. } Assumpsit.

And the said Hugh Maher, impleaded with the said Edward Kelley,
18 in his own proper person comes and defends the wrong and injury, &c., and prays oyer of the writ of the said plaintiffs in this cause, and it is read to him in these words, to wit:

Circuit court of the United States of America, northern district of Illinois.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Edward Kelley and Hugh Maher, if they shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Lemuel Crawford, David W. Cross, and Henry B. Payne in a plea of trespass on the case upon promises to their damage, as they allege, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Chicago aforesaid, this eighteenth
19 day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the 87th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Which being read and heard, the said defendant Hugh Maher, impleaded with the said defendant Edward Kelley, prays judgment of the writ aforesaid, and also of the declaration of the said plaintiffs against the said defendant Hugh Maher, impleaded with the said defendant Edward Kelley, filed in this cause, because he says that there is a variance between the writ aforesaid and the declaration of the said plaintiffs filed in this cause against the said defendant Hugh Maher, impleaded, as aforesaid, with the said defendant Edward Kelley, in this, to wit, that in and by the said writ the said plaintiffs are called by the christian and sir names of Lemuel Crawford, David W. Cross, and Henry B. Payne, and in the said declaration filed in this cause by the christian and sir names of Lemuel Crawford, David W. Cross, and Nathan Perry Payne. Wherefore, inasmuch as there is such a
20 variance between the writ aforesaid and the declaration of the said plaintiffs filed in this case against the said defendant Hugh Maher, impleaded, as aforesaid, with the said defendant Edward Kelley, in the christian name of the said plaintiff named and called in the said writ Henry B. and in the declaration Nathan Perry, he, the said defendant Hugh Maher, impleaded, as aforesaid, with the said defendant Edward Kelley, prays judgment of the writ and declaration aforesaid, and that the same may be quashed, &c.

HUGH MAHER.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Hugh Maher, the defendant named in the above-entitled cause and in the above and foregoing plea subscribed by him, being duly sworn, deposes and

says that the above plea subscribed by him is true in substance and in matter of fact.

HUGH MAHER.

Subscribed and sworn to before me this 8th day of October, 1862.
PHILIP A. HOYNE, *U. S. Com. N. D. Ill.*

Endorsed: Filed Oct. 8, 1862.
WM. H. BRADLEY, *Cl'k.*

21 On this day, to wit, the second day of July, A. D. 1863, came the said defendant Hugh Maher, by his attorneys, and filed in said clerk's office in said entitled cause the following stipulation, which is in the words and figures following, to wit:

Circuit court United States in and for the northern district of Illinois.

LEMUEL CRAWFORD *et al.*
vs.
HUGH MAHER, IMPLEADED WITH EDWARD KELLEY.

It is hereby stipulated that the declaration now on file shall stand as an amended declaration in said cause, and that the same need not be refiled.
July 1, 1863.

D. C. & I. J. NICHOLS, *Att'y for Maher.*

Endorsed: Filed July 2d, 1863.
WM. H. BRADLEY, *Cl'k.*

On the same day, to wit, the second day of July, A. D. 1863, came the said defendant Hugh Maher, by his attorneys, and filed in said clerk's
22 office in said entitled cause his pleas, which are in the words and figures following, to wit:

In the circuit court of the United States for the northern district of Illinois.

HUGH MAHER, IMPLEADED WITH EDWARD KELLEY, *ads.* LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE. } Assumpsit.

And the said Hugh Maher, impleaded with the said Edward Kelley, defendant in this suit, by D. C. & I. J. Nichols, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs hath above thereof complained against him. And of this he puts himself upon the country, &c.

D. C. & I. J. NICHOLS,
Att'ys for Def't Hugh Maher.

And said plaintiffs doth the like.

H. S. MONROE, *Pl'ffs' Att'y.*

And for a further plea in this behalf the said defendant, impleaded
23 as aforesaid, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, as to the first count in the said plaintiff's declaration, he, the said defendant, says that the said plaintiffs ought not to have or maintain their said action thereof against him, because, he says, that he did not execute the said agreement in writing set out in the said first count of the said plaintiffs' declaration. And of this he puts himself upon the country, &c.

D. C. & I. J. NICHOLS,
Att'y for Def't Hugh Maher.

And for a further plea in this behalf the said defendant, impleaded as aforesaid, by like leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, as to the first count of the said plaintiffs' declaration he, the said defendant, says that the said plaintiffs ought not to have or maintain their aforesaid action against him, because, he says, that the said agreement set out in the
24 said plaintiffs' declaration was executed by said Edward Kelley in the name of Kelley & Co. as party of the second part without the knowledge or consent of the said defendant Hugh Maher, and that long before the alleged execution of said agreement set out in said first count of the said plaintiffs' declaration, to wit, on or about the 15th day of May, A. D. 1861, the said firm of Kelley & Co., then before that time existing, had dissolved partnership, and at the time of the alleged execution of the said agreement, to wit, on the 13th day of September, A. D. 1861, the said defendant Hugh Maher was not a member of said firm of Kelley & Co., and that no such firm was then, to wit, on the said 13th day of Sept., A. D. 1861, in existence, and that the said plaintiffs had actual notice of such dissolution and well knew that long before and at the time of the alleged execution of said agreement set out in the first count of the said plaintiffs' declaration that the said defendant Hugh Maher had long before that time dissolved partnership with the said Edward Kelley, and that the said Edward Kelley
25 had no authority to enter into said agreement with the said plaintiffs in the name of said late firm of Kelley & Co. or otherwise, and thereby bind said defendant Hugh Maher. And this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against him the said defendant, &c.

D. C. & I. J. NICHOLS,
Att'y for Pl'ff Hugh Maher.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Hugh Maher above-named, of said northern district of Illinois, being duly sworn, deposes and says that the second and third pleas by him above pleaded and the matters and things therein set forth are true in substance and in fact.

HUGH MAHER.

Subscribed and sworn to before me this 8th day of Oct., A. D. 1862.
[L. S.] PHILIP A. HOYNE, *U. S. Com. N. D. Ill.*

Endorsed: Filed July 2d, 1863.

WM. H. BRADLEY, *Clk.*

26 On this day, to wit, the second day of July, A. D. 1863, came the parties, by their attorneys, and filed in said clerk's office in said entitled cause their stipulation, as follows, to wit:

Circuit court of the United States for the northern district of Illinois.

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
HUGH MAHER, IMPLEADED WITH EDWARD KELLEY. } Assumpsit.

It is hereby stipulated by and between the said Hugh Maher, impleaded, &c., with the said Edward Kelley, and the above-named plaintiffs that the said Hugh Maher, on the trial of this cause, under general issue filed herein, shall have the right to introduce any and all testimony that he may have

the right to introduce to sustain any defence that he has or may have to the above case, and to make any defence that he has or may have to the *the* same, in the same manner in every respect as though the said Hugh Maher, impleaded, &c., had filed in said cause special pleas under which such testimony could be introduced and defence made, and that no objection shall be made to the introduction of any testimony by the said Hugh Maher, on the trial of said cause, to sustain any defence or to making any defence that he has or may have to said action for the want of sufficient or proper pleas as for want of proper affidavits thereto to enable him to make such defence.

July 2, 1863.

D. C. & I. J. NICHOLS,
Att'ys for Hugh Maher.
HENRY S. MONROE,
Att'y for Pl'ffs.

Endorsed: Filed July 2d, 1863.

WM. H. BRADLEY, *Clerk.*

27 On this day, to wit, the twenty-eighth day of July, A. D. 1863, in the July term of said court, A. D. 1863, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLEY AND HUGH MAHER. } Assumpsit.

Now come the plaintiffs, by their attorney, and on motion leave is given to file an additional count to their declaration. The amendment is embodied in the original declaration.

And afterwards, to wit, on the twenty-third day of January, A. D. 1864, in the December term of said court, A. D. 1863, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLEY AND HUGH MAHER. } Assumpsit.

28 Now comes Mess. D. C. & I. J. Nichols, and withdraw the plea and demurrer and their appearance for the defendant Edward Kelley

And afterwards, to wit, on the twenty-sixth day of March, in the adjourned March term of said court, A. D. 1864, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLEY AND HUGH MAHER. } Assumpsit.

Now come the plaintiffs, by their attorney, and it appearing to the court that the plea, demurrer, and appearance of the defendant Edward Kelley had been heretofore withdrawn, thereupon the said defendant Edward Kelley is three times solemnly called and comes not, but makes default. It is thereupon considered by the court that the default of said defendant Edward Kelley be entered, and that the plaintiffs have and recover of him their damages. And thereupon comes the defendant Hugh Maher, by his attorneys, and upon issue joined as to him come a jury of good and lawful
29 men, to wit, Perry P. Scarvitt, R. M. Pearson, Richard D. Van Wagener, William Abbott, Samuel Hopper, Samuel Marrs, Harley Sage,

E. Fisher, L. K. Hawthorne, Theodore Holbrook, I. L. Moore, and Peter Mattier, who are all duly elected, tried, and sworn to well and truly try the issue joined upon the plea of the defendant Hugh Maher, as well as to assess the damages as between the plaintiffs and the defendant Edward Kelley; and after progressing in the trial of said cause until the hour of adjournment arrived, the further hearing is postponed until next Monday morning.

And afterwards, to wit, on the twenty-eighth day of March, in the adjourned March term of said court, A. D. 1864, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLY AND HUGH MAHER. } Assumpsit.

Now come again the parties, by their attorneys, and come also the
30 jury in this behalf empanneled and sworn, and after hearing the argument of counsel and the instructions of the court, retired to consult on their verdict, with leave, by agreement of the parties, when they shall have agreed upon the same they may sign, seal, and deliver it to the clerk and disperse.

And afterwards, to wit, on the twenty-ninth day of March, in the adjourned March term of said court, A. D. 1864, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLY AND HUGH MAHER. } Assumpsit.

Now come the parties, by their attorneys, and the jury having returned into court their sealed verdict whereby, upon their oaths aforesaid, they do say and find, we, the jury, find the issue for the plaintiffs and assess and report the damages to the sum of six thousand and thirty-three dollars and forty-nine cents. And thereupon the defendant Hugh Maher moves the court for a new trial.

31 Circuit court of the United States of America, northern district of Illinois, March term, A. D. 1864.

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLY AND HUGH MAHER. } Assumpsit.

Be it remembered, that on the trial of the cause before the court and a jury duly empannelled and sworn, the said plaintiffs, Lemuel Crawford, David W. Cross, and Henry B. Payne, to maintain the *the* issue on their part, by their counsel, gave in evidence and read to the jury the deposition of George H. Quigg, upon his direct examination, in words and figures following, to wit:

1st interrogatory. What is your name, age, occupation, and place of residence?

Ans. My name is George H. Quigg. My age is about fifty-eight years. My occupation is that of an accountant or bookkeeper. I reside in Chicago.

2d interrogatory. Are you acquainted with the parties to this suit?

Ans. I know all the parties to this suit, except Mr. Paine.

3d interrogatory. By whom was the paper marked Exhibit "A," attached hereto, first shown to you, and are you the same George H. Quigg mentioned therein?

32 Ans. This is either a copy or the original of a paper first shown me by Mr. Drummond.

4th interrogatory. Do you know the handwriting of the parties signing that paper? And, if so, by whom was it signed?

Ans. I have seen the handwriting of Cross, of Crawford, Cross & Co., and think this is signed by Mr. Cross. The signature of Kelly & Co. is by Edward Kelly. I have seen both Kelly and Cross write.

5th interrogatory. For whom was Mr. Drummond acting at the time he drew that paper, and what did he say at the time?

(Objected to by defts' counsel on the ground——)

Ans. I understood Mr. Drummond to say that he was acting for all the parties; that he was employed by them all and for them he handed me the paper.

6th interrogatory. What did you do under that agreement?

Ans. Mr. Kelly went and gave me charge of the office and a portion of the books. Mr. Maher brought me the remainder of the books, such as I required, and I went on to examine and correct the books and find the proper balances.

7th interrogatory. How long were you so employed?

Ans. I think from about the middle of Sept., 1861, to the middle of June, 1862.

8th interrogatory. Look at the paper now shown you attached hereto, marked Exhibit "B," and state what it is and by whom made.

Ans. It is a general ballance of the books at the time it was taken off, in June, 1862, taken off by myself.

9th interrogatory. Was that or not your decision made under the
33 books of the amount due from Kelley & Co., to Crawford, Cross & Co., made under the agreement marked Exhibit "A?"

(Objected to by the defts counsel as leading.)

Ans. That was a true ballance from the ledger, which I believed to be correct at the time it was made.

10th interrogatory. Was this entirely made from the books of Kelly & Co?

(Objected to as leading.)

Ans. The ledger exhibits every charge and credit that leaves this ballance.

11th interrogatory. According to that paper what was the amount due from Kelly & Co. to Crawford, Cross & Co. at that time?

Ans. The amount appears to be five thousand four hundred and seventy-four and 34-100 dollars.

12th interrogatory. How long after the agreement was shown you by Mr. Drummond before Mr. Maher got and delivered to you the books you speak of?

Ans. Perhaps the first or second day. I couldn't say positively which.

13th interrogatory. How often did you see Mr. Maher while you were at work at the books?

Ans. Quite frequently; but could not say the number of times.

14th interrogatory. With whom of the parties to this suit did you most frequently consult, with regard to your work upon the books of Kelly & Co., and how often did such consultations occur?

(Objected to as leading and for form.)

Ans. With a few exceptions Mr. Maher was the only person with whom I consulted. Occasionally I had an interview with Kelly, but not
34 often. I hardly know how to understand the meaning of the word "consult" in this connection. I did not have consultations, but Maher would come frequently and enquire how I progressed in collecting, making up accounts, and finding errors, and different things. Kelly rarely came there unless I went for him. I rarely saw anybody else except Drummond, who acted as agent for the parties.

15th interrogatory. What directions and suggestions, if you remember any, did Mr. Maher give or make in regard to the books or accounts?

Ans. In regard to the accounts, Mr. Maher told me to be very particular, and make memoranda of all mistakes I should find. As to collections, he repeated the words to use all dilligence, so as to have sufficient to pay for my services and Drummond & Ford's commissions, and to urge on Drummond & Ford to retain sufficient in their hands for that purpose.

16th interrogatory. Was Mr. Maher cognizant from time to time of what you were doing with the books, and have you found the different accounts?

(Objected to as leading.)

Ans. Mr. Maher knew when he was in there—in the office—I was progressing with the books, but probably knew little about the condition of things until the balance was made.

17th interrogatory. Did Mr. Maher at any time before the finding of the ballance by you in any way object to your acting in the matter?

(Objected to as leading.)

18th interrogatory. What interest, if any, did he appear to take in your labor?

Ans. He appeared to be the leading man who wished to have the books settled up.

35 19th interrogatory. What did he say or do which led you to think he took particular interest in the matter.

Ans. His frequent visits to the office, and enquiries how we were getting along, and what errors were found, &c. The errors were generally exhibited to him when they were found, and when he came.

20th interrogatory. At what time did Drummond inform you he was acting for all the parties in drawing the agreement marked Exhibit "A."

Ans. I think the 15th or 16th of Sept., 1861, at the time he handed me that agreement.

21st interrogatory. How came you to render the ballance marked Exhibit "B," and to whom did you deliver it, if to any one?

Ans. According to the duty imposed upon me by the agreement to correct the books of Kelly & Co., and put them in shape, I made the ballance on the ledger, and at the request of Mr. Cross I made a copy from the ledger and delivered it to Mr. Cross.

22d interrogatory. Did you have any conversation with any of the parties to the agreement marked "Exhibit A," concerning your examination of the books of Kelly & Co.? And if so, with whom, how frequently, and what was said and done by them.

(Objected to by Nichols.)

Ans. I have had but little conversation with any of the parties about the agreement. As to the examination of the books, I have had a great deal of conversation with Mr. Maher, and considerable with Mr. Kelly, and

36 but little with Crawford, Cross & Co., because I did not see them until the books were nearly bro't up. Kelly told me at one time that Maher did not want me to bring up the books, but wanted some one else to do so. I spoke to Maher about it, and he said he had never objected to my bringing up the books.

23d interrogatory. During the time you were at work on the books of Kelly & Co. did Maher make any requests of you in regard to your work upon them? And if so, what?

Ans. He repeatedly told me to be careful and find out all the errors and to make memorandums of them, and to attend to making all the collections possible, by suit or otherwise, so as to have money enough to pay my salary and the commissions of lawyers for collecting the same.

24th interrogatory. How long have you followed your present occupation, and what experience have you had in it?

Ans. About between 30 and 40 years. I have had a great deal of experience in examining disputed books.

26th interrogatory. Please examine the books now shown you, marked Exhibit C, and state what book it is, whether or not it appears from the same that any coal was sold by the pl'ffs to the def'ts. If so, what amounts, what kinds, when it was sold, for what price, and whether or not it appears from said book that said coal was received by def'ts from pl'ffs.

(Objected to by Nichols.)

Ans. The books is the ledger of Kelly & Co. Crawford, Cross & Co.'s acc't or on the 29th page, and the credit side shown Blue Hill and Chip-
37 pewa coal to an aggregate amount, as having been received by Kelly & Co. from Aug. 13, 1860, to May 2d, 1861, inclusive, of eleven thousand four hundred and thirty-four and 16-100 dollars. Briar Hill eighteen hundred and five tons in round numbers, and two thousand two hundred and sixty-eight tons of Chippaway coal was rec., according to the credit side of the books. Three hundred and seventy-six tons of the Briar Hill was at $2 95-100, and fourteen hundred and twenty-nine tons was at $3 per ton. All of the Chippawa coal was at $2 60 per ton. I find $140 should be deducted from the aggregate as stated above.

26th interrogatory. Examine and state whether it appears from the ledger that anything is due from the defendant to the plaintiffs for profits on sales of coal. And if so, how much?

Ans It would appear by the closing entries of Chippawa or Brier Hill accounts that there was a gain to the amount of $2,080 14-100, one half of which was carried to the credit of Crawford, Cross & Co., and the other half to the credit of Maher & Kelly's profit and loss account in said ledger.

27th interrogatory. State what the books marked Exhibits D, E, F, and G are.

Ans. Exhibit D is the journal; Exhibit E is the day-book; Exhibit F is the coal register; and Exhibit G is the cash-book. They are the books of Kelly & Co.

And further to maintain the issue on their part the said pl'ff, by their counsel, produced and offered in evidence the contract annexed to said deposition of said George H. Quigg, and marked Exhibit "A;"
38 which contract is in words as follows, to wit: "Know all men by these presence that whereas Kelley & Co., of Chicago, Illinois, are justly indebted to Crawford, Cross & Co., of Cleveland, Ohio, in the sum of from four to six thousand dollars upon joint account, the exact amount to be ascertained from the books of the said Kelly & Co., by one George H. Quigg, under the supervision of the parties to this agreement, and that the amount so found to be due and owing to be final, and in consideration of such indebtedness, and the further consideration that the said Crawford, Cross & Co. agree not to sue said Kelly & Co. upon such indebtedness before the 13th day of June, 1862, unless one of the firm of Kelly & Co. shall remove out of this State, we, the said Kelley & Co., do hereby grant, bargain, and sell, assign, transfer, and set over unto the said Crawford, Cross & Co. all the accounts hereunto attached and marked Exhibit "A," together with two wheelbarrow scales, one six-tons Duyell & Forsyth scales, three coal carts, four coal screens, one office desk, and all other accounts due and owing to said Kelly & Co. upon their coal books, except the accounts now enjoined in chancery, which said chancery suit is now pending. It is further agreed by the parties hereto that the said Crawford, Cross & Co. and Payne are to put the said accounts, and each of them, into speedy collection, and use all reasonable due dilligence to collect the amounts found to be due on each
39 and all of said accounts, as far as the same can be done, and after paying the expenses of collecting said moneys, the balance so collected shall be applied to the extinguishment of the indebtedness of the said Kelly & Co. to Crawford Cross & Co., as ascertained by the said George

H. Quigg. It being distinctly understood that the said Quigg is to ascertain the amount due, to which the parties hereto now agree is to be the actual amount, and the sum so intended to be secured by the sale and transfer of the accounts and property herein mentioned, should there be any balance left after collecting the sums herein referred to, the said Crawford, Cross & Co. agree to pay the same by their agents or attorneys over to Kelly & Co., and should the said sum of accounts and the personal property herein referred to, be insufficient to pay the sum found (hereafter) to be due to Crawford, Cross & Co., then and in that case the said Kelly & Co. agree to pay the balance remaining unpaid to the said Crawford, Cross & Co.

"It is further agreed by the parties hereto that Messrs. Drummond & Ford, attorneys, of Chicago, are to superintend the collection of said accounts and the sale of the personal property hereby and herein transferred to the said Crawford, Cross & Co., and for such purpose are to have the custody and control of said books of Kelly & Co. and the said accounts, for which services they are to receive the usual rate per cent. for collections and the usual fees in case of litigated suits.

40 "In witness whereof, we hereunto set our hands, as also to a duplicate, this 13th day of September, A. D. 1861, at Chicago, Illinois.

"CRAWFORD, CROSS & CO.
"KELLY & CO."

But to the reading of the same in evidence the said def't Hugh Maher, by his counsel, did then and there object—1st. Because Schedule A, mentioned in said contract, was not produced, and because the non-production of said Schedule A, mentioned in said contract, was not in any manner accounted for. 2nd. Because said contract was incomplete without said Schedule A; and 3d. Because said contract was executed by Kelly, and said Maher was not a partner of Kelly at the time the same was executed, and was not bound by the same; which objection of the said def't Hugh Maher, by his counsel, to the reading of said contract in evidence, for the reasons aforesaid, to the said jury, the said court did then and there overrule, and decided that said contract might be read and allowed, the same to be read by said pl'ffs in evidence to the jury. [The paper was offered in connection with the deposition of Quigg, and accompanied by the statement of counsel, that the absence of Schedule A would be subsequently explained. It appeared afterwards that no Schedule A was ever made out or annexed to the agree-

41 ment. It was claimed by the defendants that though they had been partners, they were not at the time of the agreement. The court admitted the agreement for the time, saying that it might be subject to the proof to be given thereafter. The counsel of the def'ts did not subsequently request the court to exclude the agreement, and, in fact, did not again call the attention of the court to the subject.] To which decision of the said court in overruling the said objection of said defendant and allowing said contract to be read in evidence to the jury, the said def't Hugh Maher, by his counsel, did then and there duly except. The said defendant, by his counsel, then read in evidence to the jury the further deposition of said George H. Quigg upon his cross-examination in words and figures following, to wit:

1st cross-interrogatory. When and at what place you first see the paper marked Exhibit A, mentioned in 3rd direct interrogatory, and in whose possession was the same, and how many times have you seen said paper previous to the commencement of this suit?

Ans. to 1st cross-int. I think I first saw it on the 15th of Sept., 1861, at the office of W. W. Drummond, in Chicago. I received from Mr. Drummond. I do not recollect of seeing it more than once or twice.

2nd cross-int. Were not a large portion of the claims found in the books of Kelly & Co. which you and said Drummond & Ford attempted to collect,

met by alleged offsets by way of claims against Kelly, individually,
42 for articles furnished him, or by claims against him?

Ans. A good portion of these claims were against Kelly individually. A lesser number were for offsets against Hugh Maher, which were allowed by him on a considerable portion which had either been paid and not credited to the individuals making payments, and also a considerable portion claimed by individuals for damages in failure of contracts of delivery of coal. The claims which were charged to Mr. Maher were charged by his directions.

3rd cross-int. In answer to the 6th direct int. you say that Kelly went and gave charge of the office. Was that done in pursuance of the agreement marked Exhibit A?

Ans. It is my understanding that it was.

4th cross-int. Did not all books that Maher brought you contain accounts of the old firm of Kelly & Co. previous to the transactions of Crawford, Cross & Co.?

Ans. Many of them did contain exclusive transactions of Kelly & Co. previous to that time, which were not retained by me, and others contained such transactions, and also those having relation to the books and accounts put in my charge by Kelly which had relation to the claims of Crawford, Cross & Co. and which were retained by me.

5th cross-int. In answer to direct int. No. 7 you say you were engaged in correcting the books and finding the proper ballances from about the middle of Sept., 1861, to June, 1862. Were you continually engaged during
43 all that time in correcting the book and finding the proper balances? And if not, how long would it have taken you to have corrected the books and found the proper ballances?

Ans. I was continuously engaged in that business during the ordinary business hours, except such portions of the time as I was engaged in making out accounts, attending to collections and suits, which was a small portion of the time. If I had been engaged continuously it would have taken nearly as much time.

6th cross-int. How long did you occupy the office of Kelly & Co. after the 15th of September, 1861?

Ans. I am not positive, but I think up to the 1st of April, 1862. At that time the books were removed to the office of W. W. Drummond.

7th cross-int. Does the paper marked Exhibit B in answer to the 8th direct interrogatory show the ballance to Crawford, Cross & Co. from Kelly & Co. on the 13th day of Sept., 1861, as appeared from the entries on the books of Kelly & Co. at that time?

Ans. It does not; several corrections and entries having been made on the books between that time and the date of said exhibit.

8th cross-int. What was the entire amount collected from the accounts in the books of Kelly & Co. since the 13th day of Sept., 1861, by you and said Drummond & Ford up to the date of said Exhibit B, and state whether each and every sum collected by you and said Drummond & Ford was entered on said books. And if not, what portion was omitted to be entered in said books?

44 Ans. The debit side of the account of Drummond & Ford and George H. Quigg together show the amount collected by us individually and amounts in the aggregate to between $1,600 and $1,700. To the best of my knowledge all that was collected by myself and Drummond & Ford was entered on said books.

9th cross-int. Was not Hugh Maher absent from the city of Chicago from the 14th day of Sept., 1861, during the balance of said month, and how many times during the months of Sept. and Oct., 1861, did you see said Maher, and state the date of each interview?

Ans. Hugh Maher was not absent from Chicago from the 14th day of September, 1861, during the ballance of said month, because I saw him repeatedly in the office with myself during said month, and, I think, also the month of October; but how often I saw him, I cannot say, or at what particular date.

10th cross-int. How many of the persons appearing to be indebted to the firm of Kelly & Co. by Exhibit B, mentioned in direct interrogatories, have you seen since you took charge of the books, and how many were sued by Drummond & Ford?

Ans. I have seen but a small portion of them, and how many were sued by Drummond & Ford, I cannot say.

11th cross-int. Do you know all who have been sued? And if so, how many of such persons were sued by you or by Drummond & Ford?

Ans. Only the following persons have been sued, to wit: J. Ludwig & Co., Wadsworth & Wells, Doggett, Basset & Hills, and H. D. Colvin.

45 12th cross-int. By whom were all the entries subsequent to the 24th day of July, 1861, made in said books?

Ans. All of the entries subsequent to July 24th, 1861, were made by me, many of them being corrections necessary to be made in the books, and others being journalized by me from the original entries. The dates of many of the entries are not reliable.

13th cross-int. Did you at any time present to Hugh Maher or Edward Kelly previous to the commencement of this suit, to wit, the 18th day of Sept., 1862, a written statement showing the ballance of the account as taken by you from the ledger?

Ans. I never did, nor did I consider it a part of my duty to do so, having left a ballance sheet on the ledger for the inspection of all parties concerned.

14th cross-int. You say in answer to the tenth direct int. that the ledger exhibits every charge and credit that leaves this ballance. Were not a portion of the charges and credits on the ledger entered by you?

Ans. They were.

15th cross-int. Was there not at the same time that you were writing up said book of account a suit pending between the def'ts and Cadwalader Bull, of Buffalo, and did not Maher call upon you to examine the books to see the state of accounts between said def'ts and said Bull, and was you not examined as a witness in this case in relation to said books?

(Objected.)

46 Ans. There was such a suit pending at the time mentioned, and I was examined as a witness, and examined the books of account in relation to said cause, but whether at the solicitation of Maher or his counsel or of my own wish to understand the case I cannot say.

16th cross-int. Was not Maher desirous of having you find as many errors as possible in said books for the purpose of showing that Hunt, who kept a portion of such book, was an incompetent bookkeeper, and was you not sworn in the Bull case as to the incompetency of Hunt as a bookkeeper?

(Objected to.)

Ans. Maher was desirous that I should find out all errors in the books, but for what purpose I do not know. I think in my deposition in the Bull case that I said I did not think Hunt was a competent bookkeeper; and I still think that he was an incompetent bookkeeper.

17th cross-int. In answer to the 3d direct int. you state that the paper referred to in said int. as Exhibit A is either a copy *of* the original of the papers shown you by Mr. Drummond. State if you read said paper, and if so, state whether there was attached to said paper a schedule or list of accounts marked Exhibit A, or whether there was any list of accounts at-

tached to said paper, or whether, at that time or since, you have seen the list of accounts in said agreement referred to as Exhibit A.

47 Ans. I read the paper. In the body of the paper there was an exhibit mentioned, but there was no exhibit attached to the paper, nor have I seen any such paper, either before or since.

18th cross-int. In answer to the 15th direct int. you say that Mr. Maher urged upon you to use all diligence in making collections so as to have sufficient to pay Drummond & Ford's commissions. Are you certain that said Maher used the term commissions, and might he not have used the words their fees instead of their commissions?

Ans. I am not certain that the word "commissions" was used, but my understanding of it was the necessary expenses of bringing up the books and collecting the accounts. I do not know the precise word used. He may have said commission and he may not. He may have said fees.

19th cross-int. Do you take a copy of said agreement marked Exhibit A?

Ans. I did not.

20th cross-int. Did you ever show to or inform Mr. Maher that there was such a contract? and if so, when and where?

Ans. I never showed to or informed Mr. Maher that there was such a contract, for the reason that I supposed that he knew all about it, and the only time of which I knew Mr. Maher to have seen said contract was, I think, on the 28th day of May, 1862, when it was produced by Mr. Drummond to show what articles of personal property was assigned

48 thereby to Crawford, Cross & Co. At the same time Mr. Maher repudiated the said contract, stating that he had never given his assent thereto.

21st cross-int. In answer to the 17th direct interrogatory you say that Mr. Maher, previous to the finding of the ballance by you, never did in any object to your acting in the matter. Can you swear that Mr. Maher, at any time before the finding of the ballance by you, knew that you was in any way acting under said agreement, or knew what said agreement was?

Ans. I think we never had any direct conversation about any agreement, but the whole tenor of his conduct led me to believe that he was fully acquainted with the terms and stipulations under which I was acting. I cannot swear that he knew what such agreement was.

22nd cross-int. In answer to 18th direct int. you state that Mr. Maher appeared to be the leading man who wished to have said book settled up. State if said books did not contain certain accounts of large transactions in the coal business between Cadwalader Bull, of Buffalo, and def'ts, and between Scott & Rankin and def'ts, and whether suits were not pending between those parties and def'ts, growing out of said coal accounts, and if said Drummond & Ford were not acting in said suits as attorneys for said def'ts.

Ans. The books did contain accounts of large transactions between the parties mentioned. There was a suit pending between Bull and said

49 def'ts, but whether there was any suit pending between Scott & Rankin and said def'ts, I do not know. Drummond & Ford acted as attorneys for Kelly & Co. in that suit.

23rd cross-int. Can you swear that at any time you ever directly informed Hugh Maher that Drummond had shown you the paper marked Exhibit A, mentioned in direct interrogatory?

(Objected to.)

Ans. I do not recollect that I ever did, nor do I recollect that document being before us except as before stated on the 28th day of May, 1862.

24th cross-int. Look upon the card marked Exhibit H and state what you know in relation to the same.

(Objected to.)

Ans. This card was tacked up in a conspicuous part of the coal office of Kelly & Co., at the time I took charge of the books in the office, and remained there until the 12th day of December, 1861, when it was taken down by Mr. Hugh Maher, but how long it had been there before that time I do not know. The memorandum on the bottom of the card is in my handwriting.

25th cross-int. Did you go outside of the books in determining the ballance due from Kelly & Co. to the pl'ffs, as they stood at the time they were delivered to you by Kelly?

Ans. I made use of the books and of the contracts which were delivered to me by Mr. Drummond in making out the ballances; without these agreements I should not have known how to divide the profits which accrued. These contracts were signed by the parties, and I made use of no
50 other.

26th cross-int. What contracts do you refer to in your answer to the last interrogatory? and how much was the balance increased by your reference to said contracts?

Ans. I refer to the contract marked Exhibit A, and to the original contract to furnish coal by the pl'ffs to the def'ts. From the original contract I infered that Crawford, Cross & Co. were entitled to one half of the profits on Brier Hill and Chippewa coal, which profit appeared as $2,080 14, one half of which was carried to the credit of Crawford, Cross & Co. in making up the present ballance as shown by Exhibit B.

27th cross-int. Was N. P. Payne a competent bookkeeper?

(Objected to as irrelevant.)

Ans. I would not consider him as such.

28th cross-int. If Payne had been a competent bookkeeper and had kept the books correctly, how much less would have been the expense of bringing up the books and finding out the proper balances?

(Objected to.)

Ans. If the books had been entirely correct and regularly kept, I presume they might have been examined in one month, but being wrong from the first, and being obliged to undergo severe corrections before the time that Mr. Payne took charge of them, I should not think that the examination of Mr. Payne's portion of the books increased the time more than one month. My charges were $100 per month.

29th cross-int. What portion of said books was kept by Payne?
51 Did you find as many errors in that portion kept by Payne as in that portion kept by Hunt?

(Objected to.)

Ans. Payne kept the books from the middle of January, 1861, to about the middle of July, 1861. I presume I found as many errors, and perhaps more, in that portion of the books kept by Payne than in that portion kept by Hunt.

30th cross-int. If you had taken the books at the time you say Kelly gave you charge of the office, and determined from the books as they then stood without making any additional entries therein, more than was necessary for correcting the books, and without having any reference to any agreements or contracts between pl'ffs and def'ts, outside of the books, the exact ballance existing between pl'ffs and def'ts as determined solely from the books at the time, what ballance, so far as the pl'ffs and def'ts are concerned, would said books have shown at that time?

(Objected to.)

Ans. Without having reference to the original contract by which a credit of $1,040 07-100, being one half of the profits passed to the credits of the pl'ffs, the present ballance in Exhibit B would have been reduced by this amount less $200.

31st cross-int. If you had determined the ballance as stated in the last interrogatory, at the time that Kelly gave you charge of the office, and had taken therefrom the entire amount of the accounts collected by you
52 and said Drummond & Ford, what ballance would have been left?
(Objected to.)

Ans. I have stated in some of my former answers the entire amount collected by myself and by Drummond & Ford, and having made no such ballance as mentioned in the foregoing int., except as an apothesis, barely leaves this answer as a question of subtraction to be solved by any person.

32nd cross-int. If all the coal sold for pl'ffs by def'ts during the time that said Payne acted as bookkeeper had been sold for cash and the amounts paid to pl'ffs, how much, if anything, would have been the ballance from def'ts to pl'ffs at the time you took charge of the books?

(Objected to.)

Ans. It could be determined by the books, but not having figured it up I unable to tell.

33rd cross-int. You have stated, in answer to the cross-interrogatories, that a large portion of the accounts were met by accounts held by parties against Kelly. About how much would the amount of collections have increased, provided no such ofsets had been made against said accounts?

(Objected to.)

Ans. Perhaps $1,000 00, more; or less but if the accounts on the books had been true and collectable, there was much more at that time, and still is, apparently, due upon the books than enough to meet the demands of the pl'ffs.

34th cross-int. Was there not large accounts in said books of acc't
53 kept with Erie coal, Lehigh coal, Blosbury coal, and Lacawana coal received from other parties than Crawford, Cross & Co.?

(Objected to.)

Ans. There was.

And the said pl'ffs, by their counsel, then read to the jury the further deposition of said Quigg, given upon his redirect examination in words and figures following, to wit:

Redirect examination.

1st interrogatory. Did you ever have any conversation with Mr. Maher about the amount of claims against Kelly which were put in as ofsets against accounts owing Kelly & Co.? If so, what did Maher say about them, and what directions did he give, if any, about them?

Ans. Almost as soon as I would find an error such as described in the interrogatory on the first interview with Maher, I would mention it to him, and his directions were to charge them to Kelly's individual account.

2d cross-int. Why did you make the corrections and entries you speak of in your answer to the 7th cross-int.?

Ans. The books were in error as I understood them or either side of that account which I corrected.

3rd cross-int. How much of the amount collected by you and Drummond & Ford from said accounts was paid to Crawford, Cross & Co.;
54 how much of it was paid to you, and how much was retained by Drummond & Ford?

Ans. The amount which I collected or received, being about $400, I retained by myself and charged to my acc't. The amount collected by Drum-

mond & Ford amount to over $1,100 00, $600 of which I was directed by Drummond & Ford to charge to Crawford, Cross & Co. with as having been remitted to them; but upon Mr. Cross's interview with Mr. Drummond, about the middle of June, 1862, it was agreed between Drummond and Cross that there was an error in the amount of the $600, said to be remitted, of $400, which I was directed by them, and accordingly did, countercharge, leaving only $200 as the real amount remitted.

4th cross-int. Who paid you the ballance for your services?

Ans. Crawford, Cross & Co.

Fifth cross-int. From whom did Drummond & Ford receive directions concerning the collections of the accounts, if any one?

Ans. I have repeatedly heard Mr. Maher request Drummond & Ford to use all dilligence in collections by suit or otherwise, and also it would appear by Exhibit A that they were specially appointed by that instrument to do so.

6th int. Did they act mainly or not under Maher's direction in the matter?

Ans. I do not know.

7th int. After you had made the ballance sheet in the ledger, a copy of which you say is Exhibit B, to whom did you deliver the ledger, if any
55 one, and why did you deliver it?

(Objected to as far as calls for opinion of witness.)

Ans. I delivered all the books under my charge to Mr. Drummond, and the reason was that the Exhibit A showed him to be the proper party to have the charge and control of them.

8th int. How came the contract marked Exhibit A to become the subject of conversation as mentioned by you on the 28th of May, 1862?

Ans. There were some scales and other articles contained in that exhibit as having been transferred to Crawford, Cross & Co., which scales Drummond & Ford were about to dispose of. Mr. Maher thought that one large platform scales which he did not wish removed was not contained therein, consequently Mr. Drummond produced from his safe said Exhibit A, and found that said scale had been transferred.

9th int. Did Mr. Maher know for what purpose you were examining the books of Kelly & Co.?

(Objected as not calling for facts, and leading.)

Ans. I think he understood that I examined them for general collection, so as to exhibit a true state of each acc't.

10th int. Is the paper now shown you and attached hereto, marked Exhibit I, the original contract referred to by you in your cross-examination? By whom is it signed?

56 Ans. It is the same or a duplicate. It is signed by Crawford, Cross & Co. and Kelly & Co., the signature of Crawford, Cross & Co. being in the handwriting of Cross, and that of Kelly & Co. in the handwriting of Kelly.

11th int. You state in your cross-examination that if the accounts in the books of Kelly & Co. were true and collectable, there would be enough to pay the pl'ffs. Were they collectable? If not, why, and what was done to collect them?

(Objected to so far as it calls for opinion of witness.)

Ans. It was not my particular province to be the collector, but at the request of Drummond & Ford I presented a portion of the bills, some of which I found to have been paid and receipted for; others of these accounts were claimed to have been settled by reason of failure in contracts for coal to have been delivered; and the general conclusion which I came to from those which I had presented was that very few were collectable.

GEORGE H. QUIGG.

And further to maintain the issue on their part the said pl'ffs, by their counsel, then produced and read in evidence the contract marked Exhibit I, and mentioned in said redirect examination of the said Geo. H. Quigg, which is in words and figures following, to wit:

57 EXHIBIT I.

Mem. of an agreement.—Crawford, Cross & Co., of Cleveland, Ohio, of the first part, and Kelly & Co., of Chicago, Ill., of the second part, witnesseth, that the party of the first part hereby agrees to supply the party of the second part with bitumanous coal of the several varieties usually found in the Cleveland markets, to be delivered on board of vessels at Cleveland, and at the lowest cash prices, said coal to be delivered at such times and in such quantities as will suffice to stock the yard of said second party in Chicago.

The said second party agrees to advance the freight and insurance on said coal, which shall be contracted for at the lowest possible rates, to furnish the yard, dock and sell the coal, and guarantee the payment of all bills of acc't for sales, for all which no charge is to be made, except for the actual cost of docking and delivering coal to customers, which is in no case to exceed forty-five cents per ton, and to keep accurate accounts of sales and receipts, which shall be rendered weekly to said first party. That from the aggregate receipts of each week shall be deducted the amount due said first party for the coal sold, at the prices as above stipulated, and also the amount due the second party for the insurance and freight on the same as aforesaid, and the remainder shall be divided equally between said parties.

58 And the proportion accruing to said first party shall be remitted to them punctually with the account of sale, &c., &c., and the ballance shall be retained by said second party, and received by them in lieu of all commissions and charges, except the docking and delivering as aforesaid.

In all cases when sales are made by cargo, and the coal discharged elsewhere than at the dock of said second party, said second party shall guarantee payment for the same, and shall receive a commission of ten per cent. in lieu of all other charges. All coal to remain the property of the first party until sold and delivered in accordance with the terms of this agreement. Said second party is to deal in no other bituminous coal unless the first party shall fail, after reasonable notice, to furnish a supply as aforeprovided. This arrangement to continue during the present season, and for such additional time as may be agreed on by said parties.

Cleveland, Aug. 4, 1860.

CRAWFORD, CROSS & CO.

N. B.—It is understood that the present prices of coal delivered on vessels at Cleveland are—

For Briar Hill	$3 00 per ton.
For Chippewa	2 60 per ton.
59 For Mineral Ridge	2 85 per ton.
For Pittsburg	3 50 per ton.
For Massillon	2 65 per ton.
For slack	1 38 per ton.
For nut	1 75 per ton.
For mixed	1 60 per ton.

It is further understood and agreed that all coal remaining unsold on the dock on the 1st day of May, 1861, shall be taken by said second party, if required, at said cash prices to close up the business, unless said parties shall not conclude to continue this arrangement another year.

CRAWFORD, CROSS & CO.
KELLY & CO.

It is hereby expressly agreed and understood by the parties hereto that the foregoing articles of agreement do not, nor are they intended, to form or be construed as a partnership, either special, general, or limited, but all the coals furnished by the parties of the first part are to be and remain the individual property of the said party until sold and delivered in due course of trade in the market in Chicago.

It is hereby further agreed that from and after the 15th day of Jan., 1861, the said Crawford, Cross & Co. are to furnish a good and competent bookkeeper for the firm of Kelly & Co., whose duty it shall be to keep correct and accurate books for the said firm, subject to the inspection of all
60 parties to said articles of agreement, and towards whose salary Kelly & Co. shall pay at the rate of $25 per month during the time said bookkeeper is in the employ of said Kelly & Co., said bookkeeper to be considered in actual possession of said coal as the agent of Crawford, Cross & Co.

In testimony whereof, we hereunto set our hands this 10th day of Jan., 1861.

CRAWFORD, CROSS & CO.
KELLY & CO.

Teste: W. W. DRUMMOND.

And further to maintain the issue on their part said plaintiffs, by their counsel, then produced and offered in evidence the books of account mentioned in said deposition of the said George H. Quigg, and marked and referred to in said deposition as Exhibits C, D, E, F, and G.

The said Exhibit E (the day-book) contained the following entries, which had been entered by said Quigg after the thirteenth day of Sept., A. D. 1861, to wit:

CHICAGO, *August* 3*d*, 1861.

Sundries to Sidney Kealish—		
	By cash paid N. P. Payne, and not credited	$8 95
61	By chg. on 1 ton coal April 19th.....	4 50
	By cash overpaid on bills rendered	58
		14 03
Briar Hill coal to S. Rolish, by error in charging ¼ ton on May 1st, should have been charged to J. J. Kelly.....		1 50
24th. Sold this date to—		
J. S. Jaberton 1,700 lbs. Lacawana, $6		5 10
A. B. Meeker 2,000 Chippewa, 4		4 00
Same 2,000 Briar Hill, 4½.....		4 50
Savage & Bro. 2,000 Briar Hill, 3 00.....		3 00
26th. Sold to the following persons this date, viz:		
J. Patrick 1,000 lbs. Briar Hill, at 5 00.....		2 50
Mr. Kennedy 500 lbs. Briar Hill, 25th, 5 00		1 25
O. Lunt & Bro. 2,025 lbs. Chippewa, 25, 4 00.....		4 05
Same 1,950 lbs. Chippewa, 25, 4 00.....		3 90
		11 70
27th. Sold propeller Backus 28,000 lbs. Briar Hill, in the yard, at 4 00.....		56 00

29th.	O. Lunt & Bro. 2,000 lbs. Chippewa, at 4 00.....	4 00
July 30, 1861.	O. Lunt & Bro. 1,925 lbs. Chippewa, at 4 00	3 85
	J. S. Saberton 1,725 Lacawana, at 6 00.....	5 17
62	A. B. Mee'ter, 800 lbs. B. Hill, 4 50.....	18 00
	J. S. Saberton, 1,745 lbs. Lackawana, 6 00.....	5 23
		32 25

CHICAGO, 31*st July*, 1861.

Sold to, viz:

O. Lunt & Bro. 2,950 lbs. Chipewa, at 4 00.....	$4 30
Murphy & Boyd, 2,000 lbs. Lacawana, at 6 00.....	4 75
	9 05

Aug. 1st. Sold to sund's, viz:

O. Lunt & Bro. 2,005 lbs. Chip., at 4 00.....	4 01
J. S. Saberton 1,510 lbs. Lack., at 6 00.....	4 53
O. Lunt & Bro. 1,935 lbs. Chip., at 4 00.....	3 87
Cook & McLean 2,000 lbs. B. Hill, at 4 75.....	4 75
	17 16

2nd. Sold to sund's, viz:

Ludwig & Co. 1,900 lbs. Br. Hill, at 5 00.....	4 75
O. Lunt & Bro. 1,860 lbs. Chip., at 4 00.....	3 72
J. S. Saberton 1,310 lbs. Lack. at 6 00	3 93
	12 40

3d. Sold to sund's, viz:

E. Kelly 8,000 lbs. Br. Hill, at 4 50.....	18 00
Cash Resp. p'r 300 lbs. Chip's, at 5 00.....	75
O. Lunt & Bro. 1,960 lbs. Chip., at 4 00.....	3 92
A. B. Meeker 2,000 lbs. Chip., at 4 00.....	4 00
	26 67

5th.	Sold to Londerging, 1,000 lbs. of Blosbury coal, at $6..	3 00

6th. Sold to sund's, viz:

63	O. Lunt & Bro. 3,920 lbs. Chip., at 4 00.....	4 84
	A. B. Meeker 2,000 lbs. Chip., at 4 00.....	4 00
	Savage & Bro. 1,910 lbs. Lack., at 3 00.....	2 86
	John Wolty 1,000 lbs. Lack., at 3 00.....	1 50
		6 20

CHICAGO, *7th August*, 1861.

Sold to Sidney Kalisch 2,000 lbs. of Lacawana coal, at 6 00... $6 00

8th. Sold to sund's, viz:
O. Lunt & Bro. 1,900 lbs. Chip'a, at 4 00..... 3 80
A. B. Meeker 4,000 lbs. Chip'a, at 4 00..... 8 00
J. Ludwig & Co. 2,440 lbs. Br. Hill, at 5 00..... 6 10
Murphy & Boyd 2,000 lbs. Br. Hill, at 4 75..... 4 75
22 65

9th. Sold to sund's, viz:
O. Lunt & Bro. 2,000 lbs. Chip., at 4 00..... 4 00
John Wolty, (screenings,) 1,000 lbs. Chip., at 3 00..... 1 50
J. Patrick, (10th,) 1,000 lbs. Br. Hill, at 5 00..... 2 50
8 00

13th. Sold to sund's, viz:
A. B. Meeker 2,500 lbs. Br. Hill, at 4 50..... 6 25
O. Lunt & Bro. 2,185 lbs. Chip., at 4 00..... 4 37
J. Ludwig & Co. 2,290 lbs. Br. Hill, 5 00..... 5 70
16 40

64 14th. Delivered H. D. Colvin, 15,975 lbs. egg coal, by Mr. O'Leary, this date. Dockage only, and allowed for damages non-fulfil. contract.

Sold to sund's, viz:
A. B. Meeker 2,000 lbs. B. Hill in yard, 4 50..... 4 50
O. Lunt & Bro. 2,150 lbs. Chip., at 4 00.. ..... 4 30
8 80

15th. Sold to sundries, viz:
Savage & Bro. 2,135 lbs. Chip. scr'g, at 3 00..... 3 20
Cook & McLear 2,285 lbs. Chip., at 4 75..... 5 43
H. Maher, p'r T. Miller, 3,000 lbs. Chip., at 4 50..... 6 75
Kirchoff Brothers 1,000 lbs. Chip., at 4 50..... 2 25
O. Lunt & Bro. 2,000 lbs. Chip., at 4 00..... 4 00

16th. Delivered to H. D. Colvin 16,345 lbs. of egg coal, by O'Leary. Dockage only.

CHICAGO, *4th October*, 1861.

Joseph Hogue paid the ballance of his account to Edwin Kelley, which Kelly paid out to Drummond & Ford, amounting as p'r ac. of ledger to..... $14 00

Cook & McLean paid the balance of ac't to Geo. H. Quigg, as follows, viz:
65 Their bill against E. Kelly..... ..... 1 25
Cash handed to Geo. H. Quigg..... ..... 18 67
19 92

7th. Drummond & Ford p'd this date to Geo. H. Quigg in cash	$20 00
And also am't, by Quigg, of Edwin Kelly, viz:	
1 int. $5, and 3rd $10, p'r Quigg, (mem. and recept passed to D. & Ford,) p'r am't of	15 00
	35 00
12th. Murphy & Boyd settled their atc. this date as follows, viz:	
By a deduction to be made on B. Hill coal for screanage ret., say	1 06
By cash handed Geo. H. Quigg	16 13
	17 19
17th. Rec. of Cutler, Witbeck & Co., by Geo. H. Quigg, of their atc. in cash, say	6 95
And C. P.'s 4 4 18 lumber, as of May 28, '61, Mr. Kelly	1 30
	8 25
18th. R. Meadowcraft p'd the balance of his atc. this date to Geo. H. Quigg	2 25
24th. Rend. to John S. Reed his atc. am't	31 80
Paid by charge to Cutler, Whitbeck & Co. p'r	5 50
" Blosburg coal, hauling, old bill	2 70
" Chippawa coal atc., deduction	3 00
" Geo. H. Quigg, p'r c'k of	20 60
	31 80

66 CHICAGO, 16*th August*, 1861.

Sold to sund's, viz:	
Thomas Fagney 4,000 Lack'a, at 6	$12 00
C. Lunt & Bro. 4,235 Chip'a, 4	8 47
Propr. T. M. Backus 42,000, in yard, do., 4	84 00
James Duffy 2,250 Br. Hill, at 4 50	5 06
	109 53
17th. Sold to sund's, viz:	
James Duffy 3,750 Br. Hill, at 4 50	8 44
Murphy & Boyd 2,000 Br. Hill, 4 75	4 75
	13 19
19th. Delivered to H. D. Colvin 3,510 egg coal, by J. O'Leary.	Dockage only.
Sold to sund's, viz:	
O. Lunt & Bro. 2,200 Chip., at 4	4 40
Same, 2,465 do., 4	4 93
	9 33

20th. Sold Bodger, 3,805 Br. Hill coal, 4	$7 61
21st. Sold to sundries, viz:	
O. Lunt & Bro. 2,315 Chip'a, 4	4 63
J. Ludwig & Co. 2,000 Br. Hill, 5	5 00
	9 63
22d. Sold to sund's, viz:	
A. B. Meeker 2,000 Br. Hill, at 4 50	4 50
J. Ludwig & Co. 1,825 do., 5	4 56
	9 06
24th. Sold to sund's, viz:	
67 Savage & Bro. 2,238 Lack., at 3	3 35
A. B. Meeker 3,000 Br. Hill, 4 50	6 75
	10 10
Sold to A. B. Meeker 2,000 Br. Hill, at 4 50	4 50
Cash, (27th,) 200 Chip. in yard, 4	4 00
H. Maher, (per P. Rees,) 9,050 Chip., 4 50	20 36
	28 86

CHICAGO, 28*th August*, 1861.

Sold to sund's, viz:	
Cash, (Bartlett,) 1,000 lbs. Chip., at 4 50	$2 25
David Hutchinson 1,000 do., 4 50	2 25
Magdalen Asylum 4,000 do., 4 50	10 00
	14 50
29th. Sold to sund's, viz:	
Murphy & Boyd 2,100 lbs. Br. Hill, at 4 95	4 99
Ditman 2,000 Chip., scr'g 3	3 00
O. Lunt & B. 4,280 do., 4	8 56
	16 55
30th. Sold to sund's, viz:	
J. Ludwig & Co., 3,980 lbs. Br. Hill, at 5	9 95
Philip Cowley, 2,000 do., 5	5 00
	14 95
31st. John Wolty, 1,000 lbs. scr'g, at 3	1 50
O. Lunt & Bro. 4,495 do. Chip., 4	8 99
	10 49

Sep'r 3. Sold to sund's, viz:

O. Lunt & Bro. 4,500 lbs. Chip., at 4	$9 00
J. Ludwig & Co. 4,485 Br. Hill, 5	11 21
	20 21

68 4th. Sold to sund's, viz :

J. Ludwig & Co. 4,095 Br. Hill, at 5 00	10 28
O. Lunt & Bro. 4,465 Chip., 4 00	8 93
Same, 6th, 3,680 Chip., 4 00	7 36
Same, 7th, 3,770 Chip., 4 00	7 54
Same, 9th, 4,360 Chip., 4 00	8 72
Kerchiff Brothers 2,000 Chip., 4 50	4 50
	47 33

10th. Sold to A. B. Meeker, this date, in yard 6,000 Chip., at 4 00 ..... 12 00

CHICAGO, 11*th September*, 1861.

Sold to O. Lunt & Bro 2,400 Chip. coal, 4 00	$4 80
Same, 2,435, do	4 87
Same, 13th, 2,335 screenage, 3 00	3 50
Same, 13th, 2,395 do	3 54
Same, 14th, 2,460 do	3 69
Same, 16th, 2,225 do	3 34
Same, 17th, 2,420 do	3 63
Same, 18th, 2,520 do	3 78
Same, 19th, 2,125 do	3 69
Same, 20th, 2,335 do	3 50
Same, 20th, 2,335 do	3 50
Same, 21st, 2,150 do	3 22
	45 06

Edward Kelly received of Scoville & Throops, assignees of P. W. Gates & Co., the balance of their account which was omitted to be entered up either to Kelly or cash ac., of

69 consequence Lehigh coal was without a cr., viz :

Oct. 20, '60. Cash p'd to Kelly	392 71
Nov. 12, '60. Do. bal. do	1 45
	394 16

(See petty ledger page 13.)

R. Meadowcraft p'd Mr. Kelly, as per bill and receipt the 14th Sept., '60, in cash 27 75

Deduction on coal to be charged thereto 1 75

29 50

(See petty ledger, page 24.)

Oct. 31. James L. Howe, paid the balance of his ac. to Geo. H. Quigg this date	$22 75
Nov. 1st. William Sill & Co. paid the bal. of their ac. to Geo. H. Quigg, this date	12 08
Nov. 7th. William Thorn p'd bal. ac. to Geo. H. Quigg	2 75
Nov. 14th. William Baragnanath p'd bal. to G. H. Quigg	8 00

CHICAGO, *November 19th*, 1861.

Presented to C. R. Larabee's ac. for coal delivered	$18 29
Deducted for non-fulfilled cont	5 00
Rec'd the ballance by Geo. H. Quigg and gave receipt	13 29

27th. Presented to J. J. Richards a bill of $10 00.

Cash p'd Sept. 10, '60, not on c. book	8 50
Deducted for non-fulfillment of cont	1 50
Paid the ballance to Geo. H. Quigg, p'r r'ct	6 00
	10 00

70 30th. Presented to the Even & Quigly's bill $6 04.

Found receipts up to May 6, for which cash should have been deducted	3 29
Cash p'd Geo. H. Quigg this date in full	2 75
	6 04

Dec. 2d. Presented S. B. Walker's bill of $78 71.

Deducted for non-fulfillment of cont	28 71
Rec'd c'k to G. H. Quigg to ballance ac	50 00

9th. Buel, Hill & Granger paid in the ballance of their account to Dewolf, J. P. $11 00

Paid DeWolf costs in suit *vs.* Haddock	1 45	
Do. Fleming & Co	2 00	
		3 45
		7 55

(Receipts for costs in safe.)

11th. Drummond & Ford remitted to Crawford, Cross & Co. as follows, viz:

Oct. 6, '61, sum of	100 00
Oct. 6. P'd tel. dispatch	80
Oct. 7th. Remitted cash	100 00
Oct. 10. Do	100 00
Oct. 11. Do	100 00
Nov. 27. Do	200 00
	600 00

CHICAGO, 11*th Dec.*, 1861.

Drummond & Ford collected of sundry persons as follows, viz :

Magdalen Asylum		$20 25
E. J. Tinkham		22 50
	Orington, Lunt & Bro	214 09
71	Coan & Tenbrock (note at 60 days)	39 75
	Honore, Hall & Co. (order for hardware)	86 25
Rev'd D. Dunne		66 62
Mother Francis		75 00
Hammill & Reynolds		5 50
James Duffy		10 83
Cash of Edward Kelly		334 32
		875 11

14th. Edward Kelly gave to Geo. H. Quigg, this date, his order on A. Lonteying for this sum on ac. services 4 00

Presented James Marks ac. of $24 22. Deducted for non-fulfilment of cont., 8 00. The bal. p'd to Quigg..... 16 22

Robert S. Hunt rend. his ac. for services from Apr. 15, '60, 9 months' rate of $500 p'r annum..... 375 00

Drummond & Ford collected of J. Ludwig & Co., on 1 Sept., the sum of..... 25 00

Cr. A. Lontiying's acc't:

By cash for counter charge on Aug. 19th, made in error 3 00

By stock of personal property for his bill of saw, axe, hammer, mer, &c., &c 13 00

16 00

72 CHICAGO, 14*th Dec.*, 1861.

Edward Kelly is to be charged, agreeably to his own order:

For bal. of Flemming & Co. acc't		$76 34
	Chas. Denudy "	79 18
	C. B. Farwell's "	153 13
	Geo. E. Purrington's acc't	50 51
	John McCormick's acc't	138 22
	Hollish & Wilkins's acc't	15 50
	V. D. Weldenburg's acc't	23 50
	Jno. F. Stafford's acc't	29 75
	Martin Green & Co. acc't, Sept. 5, '61	200 00
	Tug McLelan, on ac., Oct. 2, '61	319 32
	Ellis & Gallagher	5 75
	Propeller S. Bachus	9 00
	Mr. Badger	7 61
	Levi J. Coulborne	9 30
	Dr. N. S. Davis	13 00
	J. H. Burch	212 51
	Wm. Gallagher	7 00
		1,349 63

Charge cash for the following acc'ts, having been paid but omitted to be entered at the time, viz:

To Hiram Wheeler, to balance ac		$7 00
Thomas E. Barker, do		12 00
John Wolty, this am't p'd		2 98
Osborne & Brother, do		158 24
suspense ac. contra charged		31 55
To John Smith, p'r petty ledger		22 00
73 James Barton, per do		27 50
Charles Beesherger, to bal		12 35
To J. W. Daily, p'r petty ledger		5 50
Kirchoff Brothers paid Kelly		6 75
Chicago Water Works do		39 60
J. W. Doane to bal		16 00
		341 47

CHICAGO, 14*th Dec'r*, 1861.

Mr. Kelly settled with Thompson & Kennedy and allowed them for failure in cont	$100 00
Rec. the bal. of their ac. by him	51 39
	151 39

Charge tug McLelan to the Cr. of Briar Hill Coal for this am't had from the Ohio and Penn. Coal Co. on our ac	83 23
Charge Ohio and Penn. Coal Co., to the Cr. of R. Pendervill, for bal. of the former ac. paid by the latter, as p'r bill	83 23
Debit Martin Green & Co.:	
For 2,000 Blosbury coal from Meekis yard, Mar. 18, '61, omitted p'd p'r dredge	9 50
Charge p. and loss to Cr. of B. F. Hadduck for non-fulfilment of cont.	5 50
74 Charge Martin Green & Co. to credit of tug McLelan as they are one and the same	309 49

Charge profits and loss ac't to the following, viz:

To Hoffgen & Snyder, to bal. a'c	1 05
Charles Thorp, do	75
Ballance small sums, do	2 51
Col. J. D. Graham	1 62
C. C. Rosenberger	50
Captain Hawkins	6 00
	12 43

CHICAGO, *Dec'r* 14*th*, 1861.

Charge cash to Cr. of the following acc'ts, having been paid and omitted to be entered at the time, viz:

To J. E. S. Fuller, to bal. pr. p. ledger	$48 00
Weller, Mudd & Mellon, do	9 75
Socafell & Brothers, do	11 00
F. Hoffman, do	11 00

To Mr. Henry Sedgwick, st., do	$11 50
J. H. Reed, druggist, do	12 00
Henry Banks, to bal. do	2 50
Mr. Hall, do	2 75
Dormid Gensky, do	5 50
E. T. Watkins, do	4 75
John, do	6 00
Jerry O'Conner, do	16 00
A. E. Morgan, do	12 00
	132 75

75 Charge Briar Hill coal to the credit of Orin C. Moody, he having returned the coal 1 75

Charge W. W. Drummond to the credit of cash acc't for this am't pd. him last spring, omitted to be entered as agreed between Drummond and Kelley in my presence (Quigg.)..... 130 00

Charge N. S. Bonton, to the credit of bills receivable, as we neither have nor ever had the notes as represented by his ac.. 591 22

CHICAGO, 14*th Dec'r*, 1861

Make sundries Dr. to profit and loss, for the following small ballances to close a'c., viz:

Hawkins and Chapman, to balance	$0 07
Steamer Michigan, do	10 00
Propeller Wenona, do	5 42
James McKindley Co. do	1 86
	17 35

31st. Settled with the Powers & Co. by comparing bills and receipts, and find them entitled to a Cr. deduction to bal. their ac. 22 62

Expenses is to be charged to credit of J. H. Wells, per am't bill advertizing done for us by him..... 6 50

76 Charge J. H. Smith & Co. on their books to the credit of Kelly & Co.'s old ac., for am't of latter's ac. on old books trans. amounting to sum of..... 235 14

Less am't Cr. on old books, 37 10..... 198 14

James A. Smith & Co. are entitled to a Cr. for the following items, viz:

For cash paid as per Richards, viz:	
Receipt as of Nov'r 11, '59	113 20
For do. per Evans's receipt, do	48 00
p'd G. H. Quigg, Feb. 13, '62 to bal	14 14
am't allowed as non-fulfilment of cont. on hard coal in 1860.	36 84
	212 18

Charge expense ac. to the credit of Foster House for board of Mr. Dutch, per Paine's receipt, May 16, '61 ..... 25 10

CHICAGO, 31*st Dec'r*, 1861.

Charge Edward Kelly for the amount compromised with S. F. Drake ac. of failure in coal cont. delivery as of May 2, '61.....	$500 00
Less cash credited to Briar Hill ac. May 7, '61, per C. B. 131, say $200 00, less same 11, '61, per C. B. 132, say 167 81.....	367 81
	132 19
77 Charge profit and loss to the Cr. of E. H. Haddock, for the bal. of his ac., being settled in failure of coal cont. Jan. 7, '61.....	5 00
Discounted Dorm Bermis & Co. note due Ap'r 1st, $250. Rec., in cash sum of.....	21 00
Dis'c't share on note.....	4 00
	25 00

APRIL 1ST, 1862.

Drummond & Ford rec'd on the 21st of January (by Mr. Ford) of Ludwig & Co. the sum of.....	$10 00
Drummond & Ford rec'd of Edmund Gill (by Drummond) the sum of.....	10 00
Hugh Maher paid to A. B. Meeker & Co. the ballance of Kelly & Co. ac.....	21 15
Also on ac. of Geo. H. Quigg for one cord hickory wood.....	6 00
	27 15

CHICAGO, 1*st April*, 1862.

Doct. William Whitney paid to Edward Kelly, during summer of '61, as per acc't of both parties, on ac.....	$30 00
And gave his note for ballance of ac.....	35 31
	65 31
Charge Drummond & Ford to the credit of Peter Everts for this am't collected by Mr. Drummond, of Calvin DeWolf, J. P., to bal. ac.....	10 00
78 Make Briar Hill coal ac. Dr. to Martin Green & Co. for the following amounts of coal counter charge, viz: April 15, '61, ac. tug McLelan.....	4 95
Charge, viz: April 15, '61, ac. tug McLelan	17 20
May 16, '61, do.....	4 50
	26 65
Charge Briar Hill coal ac. to the Cr. of W. D. Hoffman, to bal. his ac., the same having been settled July 8, '61, from page 197.	15 00
28. Settled with Savage & Bro. this date, and paid the ac. as follows, viz: paid by them to E. Kelly, Aug. 16, '61, on their note of May 10, '61, as per receipt.....	15 00
Do. p'd Drummond & Ford, Jan. 20, '62, bal. s'd note.....	7 98
	22 98

Brought forward		$22 98
Cash p'd same Dec'r 26, '61	$10 00	
Do. same, Feb. 8, '62	10 00	
	20 00	
Received of them this date their note at 60 days for sum of	39 34	
Deduction made on Chippewa or Briar Hill coal previous to May 2, '61, and not Cr. to them at the time, say 68 22		127 56
		150 54

CHICAGO, 17*th May*, 1862.

Settled with John Jones, and finds that he deserves a credit by Briar Hill coal for 2 tons, at 500	$10 00
By cash previously paid and not credited	15 00
79 By expense ac. per cash, now paid and appropriated for cost in sundry suits in justice's court, &c	15 00
	40 00

May 27th. Make Hugh Maher debit to the Cr. of Geo. H. Quigg, as a counter charge of 1 c'd hickory wood, sent by firm to Meeker & Co. April 1, '62, being designed as a present to latter 6 00

May 28th. Sold to H. Maher, this date, 1 large platform scales and 2 small Wheeltaner's scales, for $75 00. Rec'd his c'k on Greenbaum Bros. for the am't. Part ac. G. H. Quigg 70 00

Part ac. Drummond & Ford 5 00

	75 00

May 28th. Sold Br. Hill screenings by James Flemming, for cash, Oct. 2, '61, amounting, per cash-book, 142 11 00

May 28th. Cash paid out by Flemming on ac. of cartage on the above $2 50

Do. handed to Drummond & Ford 8 50

	11 00

May 28th. William Lock paid the bal. of his ac. on these books to Drummond & Ford last fall, as per statement of Mr. Drummond 15 56

CHICAGO, 31*st May*, 1862.

Drummond & Ford rec'd by Drummond of J. Ludwig & Co.,	
80 March last, omitted to be entered at time, cash	2 00

May 31st. Settled with E. Vanhorn by Drummond & Ford, by allowing a deduction for failure on cost of 32 26

The bal. of ac. paid Drummond 15 00

	47 26

May 31st. James Van Buren settled his ac. by note of Dec. 12, '62, given W. W. Drummond..... $14 00

May 31st. W. W. Drummond settled with the owner of the Orient House, and allowed a receipt for cash p'd previously..... 6 00
And bal. p'd to Drummond & Ford..... 50 30
56 30

May 31st. Make a counter charge of the following sums bro't into these books from Kelly & Co.'s old books, and placed to their Cr., viz., not belonging here:
J. P. Chapin..... 139 48
Harry Page's ac..... 34 24
James A. Smith..... 198 04
371 76

Third. Cr. Geo. H. Quigg ac. services examining said old books, six weeks, &c., &c..... 137 11
And bill rec'd Chapin & Fox note..... 60 00
Doctor W. Whitney's note..... 35 31
Savage & Brother, do..... 39 34
Profit and loss ded. on cont..... 100 00
371 76

CHICAGO, 1*st June*, 1862.

81 Charge Lacawana coal ac. to the Cr. of Edward Kelly for am't coal delivered J. S. Saberton from the 30th May, 1861, as Kelly says this was furnished by him, and should not have been credited to the coal ac. of Kelly & Co.. 179 06
And charge cash..... 42 22
And E. Kelly..... 179 06
To the credit of Saberton, for the bal. of his ac., all having been paid as per his receipts in (his) Kelly's handwriting..... 221 28

June 1st. Edward Gill furnished hay to Kelly & Co. in year 1861, viz: 1 load, 2,300; 1 do., 2,065; 1 do., 2,185; 1 do., 2,980; 1 do., 2,820—12,350 lbs., at $5 per ton..... 30 87

June 1st. Holbrook & Co. gave Mr. Kelly order on furniture store, in 1861, to balance their ac. (Store on Randolf st.; name not recollected.)..... 48 00

June 1st. Edward Kelly collected, Oct., 1861, of seamer or propeller Backus, the am't of bill certified as correct, and claims it as his individual property, but there is nothing on books to corroborate that statement..... 140 00

82 June 1st. Charge expense to Cr. of G. H. Quigg for sundry small am'ts of cash paid by him during last 9 mo., per memo..... 9 60

CHICAGO, 14*th June*, 1862.

On an examination of the Briar Hill and Chipewa coal acc'ts it is found that said acc'ts have been charged for labor of handling, &c., an amount equivalent, or very nearly appropriating 45c. per ton on the whole am't rec'd, and having been also charged with the freights, &c. Now, if Kelly & Co. are by these articles of agreement obliged to guarantee all sales made of said coal, it would appear that the apparent gain on said coal, as per ledger, say $2,080 13, is to be divided equally between Crawford, Cross & Co. and Kelly & Co.'s profit and loss ac., and their coal accounts closed accordingly, viz:

To Cr. of Crawford, Cross & Co	$1,040 70
Cr. of profit and loss ac	1,040 06
	2,080 13

Charge expense ac. to the credit of G. H. Quigg for services from 16th Sept., '61, up to this date, both inclusive, at the rate of $100 per mo	900 00
Less am'ts already entered on ac. of Kelly & Co., old book exam'r	271 76
	628 24

Charge one half of the foregoing entry to the debit of Crawford, Cross & Co. to the credit of expenses acc't, or else make exp's to them each Dr. to Quigg for their respective share of	
83 said services, say	314 12
Charge Charles B. Brown to the Cr. of profit and loss per bal. of his ac	3 00

Exhibit D, is the journal, the last 41 pages of which, headed "corrections to be made," were entered by said Quigg subsequent to September 13, 1861, which 41 pages includes all the entries on the day-book hereinbefore mentioned, and also includes entries of sales of coal to the amount of $4,323 02, of which amount $28 35 appears by said entries to have been sold subsequent to September 13, A. D. 1861, which 41 pages also includes sales of coal to the amount of $2,631 83-100, which is included in above amount $4,323 02, taken from another book called the petty ledger, of which last amount $852 56-100 was for sales Briar Hill and Chipawa coal.

Said forty-one pages also includes the following among other entries, to wit:

CHICAGO, *July* 26, 1861.

	Cash Dr. to Edward Kelly, 15 00:	
26.	To this am't to Crawford, Cross & Co	15 00
	83. Cash ac., Dr. to Hapin & Fox, 90:	
	40. For this amount by Kelly, April 30, 1861	40 00
84	40. Same, do. May 31, 1861	50 00

AUG. 3.

	26. Edward Kelly Dr. to Briar Hill ac't, 18 00:	
94.	For 8,000 lbs. pr. d. book, at $4 50	18 00

SEPT. 12.

26. Edward Kelly Dr. to Wright & Currier, 5 00:
For am't rec'd by him not entered in cash $5 00

26. Edward Kelly Dr. to Lehigh coal ac't, 394 16 :
For this am't collected of Schoville & Sharp, assignees of P. W. Gates & Co., Sept. 14, 1860, Nov. 12, 1860, for particulars see ledger, page 13 ..... 394 16

26. Edward Kelly Dr. to sundries, 27 75, viz :
24. Briar Hill coal ac. for this am't rec'd in coal of R. Meadowcroft, Sept. 14, '60, omitted 15 75
15. Lackawana coal for this am't of same, do..... 12 00

26. Edward Kelly Dr. to sundries, 360 57, viz :
16. Erie coal ac. for am't delivered Marine Hospital in Aug. 1860, per P. L. 18 ..... $165 75
Less paying $20 com. 8 68
157 07
15. Lacawana coal for this am't..... 214 85
Less propr. of com..... 11 32
203 50

26. Edward Kelly Dr. to propr. Montezuma, Capt. Robins, 37 35 :
327. To am't of bill as above paid to former, and neither
85 entries in cash ac't, or credited to the latter ac't, as per petty ledger, page 19 ..... 37 35

CHICAGO, 12*th Sept'r*, 1861.

26. Edward Kelly Dr. to sundries, 11 05, viz :
331. Geo. Mensers for pay't of bill not cred. in cash 5 00
331. Rawson & Bartlett for same..... 6 05

26. Edward Kelly Dr. to expenses ac., 132 19 :
19. For counter charge of an errror in debiting the latter ac. in settlement of Cutler, Whitbeck & Co., lumber bill of February 9, '61 ..... 132 19

Mrs. Burget Dr. to Briar Hill coal, 6 00 :
26. Edward Kelly for 2,000 lbs., Dec. 17, '60, per P. L. 63 ..... 6 00

OCT. 4.

26. Edward Kelly Dr. to Joseph Hogan, 14 00:
253. For balance of latter acc't p'd former..... 14 00

OCT. 7.

98. Geo. H. Quigg Dr. to Drummond & Ford, 15 00:
For am't of E. Kelly, 1st inst..... 5 00
Ditto, same, 3d inst 10 00
15 00

OCT. 17.

26. Edward Kelly Dr. to Cutler, Welbech & Co., 1 36:
For 6 p's, 4, 4, 18 scanlting 1 30

OCT. 4.

26. Edward Kelly Dr. to Cook & McLaine, 1 25:
86 For latter's bill as per 1 25

DEC'R 11th.

26. Edward Kelly Dr. to Cone & Tenbrook, 78 98 :
For this am't for balance of Bugg & Co $78 98

DEC'R 11.

100. Drummond & Ford Dr. to cash acc't, 554 32 :
92. For this am't paid them by Edward Kelly, as per statement of W. W. Drummond 334 32

DEC'R 14.

George H. Quigg Dr. to Edward Kelly, 4 :
26. For latter's order on A. Laubuging, handed to former am't.. 4 00

CHICAGO, *December 14th*, 1861.

Edward Kelly Dr. to Thompson & Kenedy, 51 39 :
26. For bal. latter ac. collected 51 39

26. Edward Kelly Dr. to sundries, 1,349 63, viz :
312. To Fleming & Co. for bal. their ac. paid to him 76 34
286. To Charles Deneby for same 78 18
256. To C. V. Farwell for same 153 13
258. To Geo. E. Perrington for same..... 50 51
259. To John McCormic for same 158 22
269. To Halbiter & Wilkins for same 15 50
283. To V. D. Wildenburg for same 23 50
291. To John F. Stofford for same 29 75
293. To Martin, Green & Co. for this am't paid Sept. 5, '61..... 200 00
293. To steam-tug McLane for this am't paid Oct. 2, '61.. 319 32
87 298. To Elles & Gallegar for this bill paid to him 5 76
304. To propellar A. Borbour for same 9 00
314. To Mr. Badger for same..... 7 61
317. To Levi Coutborn for same..... 9 30
319. To Dr. N. S. Davis for same 13 00
338. To J. H. Burch for same..... 212 51
356. To William Galliger for same 7 00

DECEMBER 26.

26. Edward Kelly Dr. to Rowers & Co., 125 69 :
For am't of cash paid him as of April 1, '61, omitted of entry in C. book 107 90
For order for hands as of July 19, '61, omitted..... 17 79

125 69

CHICAGO, 26*th December*, 1861.

26. Edward Kelly Dr. to James A. Smith & Co., 74 46 :
For am't of latter's bill against former..... 1 4 46

DECEMBER 31.

26. Edward Kelly Dr. to J. S. Saberton, 25 00 :
For the am't collected Oct. 3, '61, by Drummond & Ford, and Cr. to Kelly by them in error..... 25 00

DEC. 31.

92. Cash ac. Dr. to L. K. Walker, 5 50 :
For this am't paid Edward Kelly as by his own ac't heretofore.. 5 50

26. Edward Kelly Dr. to Mat. Cowley, 176 28 :
For am't of latter's ac. p'd in liquor to the former, as of 30th of Sept., 1861 ..... $176 28

88 26, Edward Kelly Dr. to Downer Bemis & Co, 3 67:
For ale of latter 3 67

Sundries Dr. to sundries:
26. Edward Kelly for half bbl. ale of Downer Bemis & Co., as of Dec'r 14, '59, at 4 75
Do. half bbl. ale, Jan. 3, '60 ..... 3 50
Do. Feb. 10th 3 50
Do. Mar. 23d 3 50
Do. May 4th 3 50
Do. May 26th 3 50
Do. Nov. 30th 3 50
Do. Jan. 25, '61 ..... 3 50
Do. and cask, Feb. 2nd 5 50

38 25
Less am't chg'd in previous entry 3 67

34 58

CHICAGO, 31*st December*, 1861.

26. Edward Kelly Dr. to Thomas McKin, 24 01:
For this am't pd. by latter ac. of former for subscription for democratic torch-lights 24 01

98. Geo. H. Quigg Dr. to Drummond & Ford, 4 50:
For this am't of E. Kelly for cash had of Mr. Hays 4 50

26. Edward Kelly Dr. to Chapin & Fox, 225 00:
For price of one black horse 125 00
For order, favor of L. Barker 50 00
For am't of cash of Harry Fox 50 00

225 00

89 26. Edward Kelly Dr. to profit and loss, 132 12:
65. For this am't used by latter on his own ac. of monies rec'd of S. T. Deake, on failure in shipment of coal (5. D. B. 341) 132 19

26. Edward Kelly Dr. to Doct. Wm. Whiting, 30 00:
For this am't per day-book, 343, ... 30 00

DECEMBER 28.

26. Edward Kelly Dr. to Savage & Bro., 15 00:
For this am't pd. by for. to latter, Aug. 16, '61 ..... 15 00

MAY 31, 1862.

100. Drummond & Ford Dr. to Edward Kelly, 14 00:
36. For this am't rec'd of J. Hagar, Oct. 4, '61, by Kelly, and charged to his ac. but was by him handed to former 14 00

CHICAGO, *June* 3, 1862.

41. Lacawana coal Dr. to Edward Kelly, 179 06:
36. To am't to Saberton from the 30th May, 1861, as per day-book $179 06

36. Edward Kelly Dr. to J. S. Saberton, 179 06:
For this am't subsequent to May 30, '61 ..... $179 06

36. Edward Kelly Dr. to Holbrook & Co., 48 00:
276. For order on furniture store on Randolph st. in 1861 to bal 48 00

36. Edward Kelly Dr. to propeller Backus, 140 00:
303. For am't latter's bill paid to former, October, 1861 ..... 140 00

92. Cash ac. Dr. to Edward Kelly, 16 00:
36. For this am't rec'd of Newbury for double deck, &c..... 16 00

90 Said 41 pages also includes the following items which had not been carried to the balance of account in the ledger, to wit:

CHICAGO, 14 *June*, 1862.

92. Cash ac. Dr. to sundries, 25 23, viz:
36. Edward Kelley for this am't rec'd of Newberry for one double desk, &c..... $16 00
330. James D. Pierce for bal. of his ac. in full..... ..... 9 23

267. Sundries Dr. to Samuel Straus, viz:
64. Profit and loss, for am't of his bill as notary against Kelly & Co. 3 75
92. Cash acc't for bal. of his acc't..... 3 00

92. Cash acc't Dr. to Geo. M. Higginson, 4 75:
For this am't to bal. his ac. 4 75

To stock of personal property, 7 00:
For this am't rec'd for one letter-press 7 00

Said Exhibit C ledger embraces all the accounts contained in the day-book and journal, including the accounts in the journal taken from the petty ledger, and includes the following accounts, to wit: first, a general ballance of accounts, a copy of which is annexed to said Quigg's deposition, and marked Exhibit B, in which said ballance of accounts are included all the entries contained in said journal and day-book, except the following entries in the journal, which were made subsequent to the making of said
91 ballance, to wit:

92. Cash ac. Dr. to sundries, 25 23, viz:
36. Edward Kelly Dr. for this am't rec. of Newberry & Co., for one double desk, &c..... $16 00
330. James D. Pain Dr. bal. of his ac. in full 9 23

267. Sundries Dr. to Samuel Straus, 6 75, viz:
64. Profit and loss, for am't his bill as notary against Kelly & Co. 3 75
92. Cash acc't, for bal. of his account..... 3 00

92. Cash ac. Dr. to Geo. M. Higginson, 4 75:
For this am't to bal. his ac. 4 75

92. To stock of personal property, 7 00:
To this am't received for one letter-press..... 7 00

Said ballance as entered on the ledger is in words and figures following, to wit:

Said ballance sheet above referred to is in words and figures following, to wit:

92 *Ballance acc't.*

1862.			
June	14. To Daniel Deneby, 9	$10	50
	Kelly & Co., old ac. 20	5,422	80
	J. S. O'Kalley, 25	13	12
	Edward Kelly, 36	2,114	66
	Rendrd Prindeville, 44	299	94
	Hosmar & Shipman, 45	103	64
	Jno. S. Williams, 50	246	92
	B. receivable, 53	14	00
	John Woltz, 54	3	00
	Fremont Exchange, 58	73	33
	W. W. Drummond, 73	350	80
	Osborn & Brother, 81	38	19
	John O'Leary, 82	104	89
	Cash, (discrepency,) 92	1,157	06
	Drummond & Ford, 100	912	75
	Office building, 103	326	92
	Lawrence Molony & Co., 247	47	93
	John Kavary, 250	6	50
	Edmund Gill, 256	11	02
	Lewis Ishell, 257	5	00
	Mrs. Lacy, 261	13	50
	W. B. Loomis, 263	6	00
	John Martin, 264	5	57
	School Dist. No. 1, 265	25	00
	Samuel Straus, 267	6	75
	Henry Nolt, 269	3	00
	F. Wheeler, 270	2	50
93	J. O. Caldahan, 271	5	25
	B. S. Shepard, 272	3	25
	S. C. Benham, 273	7	89
	John Smith, 274	3	00
	N. Kuhum, 273	47	77
	Fred. Gable, 276	3	25
	Mrs. McDonald, 278	3	00
	Dr. J. McDonald, 278	3	00
	Geo. M. Higginson, 284	4	75
	Charles Charleton, 288	3	50
	Joel Cross, (Niles,) 292	10	00
	Owen Garry, 294	1	50
	Wm. H. Stickney, 295	6	50
	E. H. Brackett, 295	25	00
	Town & Waite, 296	25	50
		11,478	25
1862.			
June 14.	To David Tremble, 7	49	51
	John McAulby, 7	31	48
	Cadwalader Bull, 21	3,459	19
	Geo. H. Quigg, 98		
	Crawford, Cross Co., 102	5,473	34
	Scott & Runkin, 245	2,611	60
	Hugh Maher, 71	753	70
		12,379	73

Ballance acc't.

1862.			
June	14.	To am't from page 104	$11,478 25
		J. B. Bennett, 296	2 38
		W. D. Scmidt, 297	6 00
		C. D. Osband, 297	3 00
		Seahan & Brother, 299	3 00
		Capt. Anderson, 301	18 25
		L. Tiffany, 302	6 00
		S. L. Cather, 302	1 70
		Michael Shea, 303	2 75
94		Mr. Nugent, 305	12 00
		J. M. Daily, 306	3 00
		A. Harvey, 307	4 00
		Bevins & Woodiff, 309	1 40
		J. Rawlins, 309	1 50
		Sidney Kalish, 311	29 18
		Mrs. Kenedy, 313	1 25
		J. Ludwig & Co., 315	25 62
		Thomas Faeney, 314	12 00
		David Hutchinson, 315	2 25
		Mr. Ditman, 316	3 00
		T. B. Roll, 316	3 00
		E. Boston, 317	3 00
		L. S. Brown, 318	5 50
		A. F. Williams, 320	1 02
		M. D. Downs, 319	5 75
		Horigan & Framer, 320	19 00
		Hoyt & Bonton, 310	5 00
		Robert Drousbury, 322	6 00
		J. J. Wright, 324	6 00
		B. J. Elphanx, 325	5 00
		Wadsworth & Wells, 326	45 00
		Daggett, Bassett & Hills, 327	42 00
		Stewart & Sawyer, 328	80 00
		E. H. Aiken, 329	6 15
		W. J. Clark, 329	18 25
		Mr. K. Malcolm, 330	6 50
		James D. Paine, 330	9 23
95		J. S. Small, 332	16 50
		Wm. Thompson, 333	5 50
		C. L. Harmon, 334	23 68
		Isaac Harmon, 334	6 00
		C. W. Patten, 335	15 25
			12,179 86
1862.			
June	14.	By am't bro't from page 104	$12,379 73

Ballance acc't.

1862.			
June	14.	To am't bro't from page 105	$12,179 86
		F. M. Smith, 336	3 50
		F. Dorsett, 338	8 50

June	14.	To H. D. Calvin, 339	$35 48
		B. W. Dodd, 339	6 00
		Chi. and Rock Island RR. Co., 340	14 00
		C. B. Underhill, 342	10 00
		N. M. Lanaway, 342	5 00
		Frank Munroe, 343	6 00
		Warren & Fuller, 344	5 87
		A. F. Townsend, 345	2 75
		John Quirk, 349	5 00
		S. M. Moore, 350	2 75
		Mr. Sweeny, 351	3 00
		Lawrence Baer, 352	7 33
		S. Ostman, 352	3 58
		B. Jennings, 353	6 00
		A. Miller, 354	1 50
		Mr. Kilgore, 354	5 43
		R. P. Baker, 355	15 43
		Doctor Scully, 355	3 50
		James Nolan, 356	7 00
		Mrs. McNellis, 358	3 25
		A. Bairll, 359	3 00
		W. B. Loomis, 359	6 00
			12, 379 73

1862.

June 14. By am't bro't from 105 ..... $12, 379 73

96 I do hereby certify that after a careful and thorough examination of Kelly & Co.'s books submitted to me about the middle of Sept., 1861, by said Kelly & Co. and Crawford, Cross & Co., that the foregoing ballance is a true exhibit in every particular, to the best of my knowledge and belief.

GEO. H. QUIGG, *General Accountant.*

Chicago, June 16th, 1862.

P. S.—Perhaps few of the personal accounts are collectable, as assets are claimed on many of them, of which there is no date on the books to show whether said assetts be correct or not.

QUIGG.

Second. The acc't of Crawford, Cross & Co. in words and figures following, to wit:

Crawford, Cross & Co.:

1860.

Aug.	31.	To cash, 37	$400 00
Sept.	30.	To Lacawanna, 41	42 00
		B. payable, 51	99 95
Oct.	31.	To B. Hill, 55	22 00
		Blossbury, 57	20 00
		Lacawanna, 57	28 00
		Lacawanna, 58	8 50
		Cash, 65	560 00
Nov.	30.	To B. Hill acc., 70	45 00
		Erie, 71	16 50
97		Cash, 78	576 93
		B. payable, 80	500 00
Dec.	31.	To cash acc't, 90	375 00

1861.			
Jan.	5.	To d'ft on N. Y., 102	$300 00
	7.	Do., 103	250 00
	16.	To cash to Mr. Cross, 104	10 00
	22.	To df't on N. Y., 104	150 00
	29.	Do., 111	375 00
	30.	To cash ac., 112	20 00
Feb.	8.	Do., 118	564 21
	27.	Do., 129	15 00
	28.	Do., 130	19 58
M'rch	5.	Do., 134	400 00
	26.	Do., 147	450 00
		Do., 147	55 40
	27.	Do., 148	108 93
		Carried over:	
May	4.	To Jno. Martin, 100	4 50
	6.	To cash, 172	450 02
	22.	Do., 180	396 62
	24.	To N. P. Payne, 182	100 00
June	11.	To cash, 187	62 00
	29.	Do., 193	7 00
July	6.	Do., 196	4 00
	9.	Do., 197	90 00
	22.	Do., 202	22 00
	24.	To N. P. P., 202	41 67
		To sund., 202	50 50
98		To cash, 202	11 00
	25.	To cash per jour'l, 208	15 00
Aug't	10.	To cash per do., 211	39 87
	13.	To cash per wagon, 211	10 00
Sept.	12.	To exchange ac., 228	91 92
			6, 809 09
1861.			
Dec.	11.	To am't transf. from 29	6, 809 09
		Drummond & Ford, 230	600 80
Jan.	14.	To Geo. H. Quigg, 242	314 12
	16.	To bal. carried down, 104	5, 198 35
			13, 198 35
1860.			
Aug.	31.	By B. Hill ac., 31	$601 80
Sept.	30.	By B. Hill, 43	1, 211 63
		Do., 43	858 86
		Chippewa, 43	1, 451 87
		Do., 43	650 00
		Do., 43	1, 084 21
		B. Hill, 43	846 00
Oct.	31.	By Chippewa, 58	780 00
		B. Hill, ac't, 58	1, 353 00
Nov.	30.	By Chippewa, 80	845 00
		Do., 80	910 00
Dec.	31.	By Chippewa, 85	476 58

1861.			
Jan'y	16.	By cash ac, 103	$100 00
May	6.	Do., 171	40 00
	2.	By Briar Hill, 192	507 25
Aug.	13.	By cash for wagon, 211	10 00
			11, 444 16
1861.			
Dec.	11.	By am't from page 29	11, 444 16
Jan.	14, '62.	By Briar Hill coal, 243	1, 040 07
	16.	By Geo. H. Quigg, 263	314 12
		Drummond & Ford	400 00
			13, 198 35
1862.			
June	16.	By bal. bro't down	5, 474 34

Third. The following account of Drummond & Ford, to wit:

1861.			
Nov.	11.	To Magdalen Assylum, 230	$20 25
		E. J. Tinkham, 230	22 50
		Rev'd D. Dunne, 230	66 22
		Cash of E. Kelly, 230	334 32
		O. Lunt & Bro., 230	214 19
		Coan & Tenbrock, 231	39 75
		Honore, Hall & Co., 231	86 25
		Mother Francis, 231	75 00
99		Hammill & Reynolds, 231	5 50
		James Duffy, 231	10 83
	14.	To J. Ludwig & Co., 1st atc., 232	25 00
Dec.	24.	Same, 234	10 00
1862.			
April	1.	To sundries, 239	80 00
		Peter Ebberts, 239	20 00
	28.	To Savage & Bro., 239	27 98
May	28.	To personal property, 240	5 00
		Cash as of Oct. 2, '61, 240	8 50
		William Lock, 240	15 56
	31.	To J. Ludwig & Co., 240	2 00
		E. Van Buren, 240	15 00
		Orient House, 241	50 30
		E. Kelly, as of Oct. 4, '61, 241	14 00
June	16.	To Crawford, Cross & Co., 243	400 00
			1, 558 05
June	16.	To ball. brought down	912 75
1861.			
Oct.	7.	By George H. Quigg, 229	35 00
		Crawford, Cross & Co., 230	100 00
		Same	80
		Same	100 00
	10.	By same	100 00

Oct.	10.	By same	$100 00
Nov	27.	By same	200 00
Dec'r	24.	By Geo. H. Quigg, 234	5 00
	31.	By same, 238	4 50
1862.			
Jan.	16.	By bal. ledger, page 104	912 75
			1,558 05

Fourth. The following account of George H. Quigg, to wit:

1861.			
Oct'r	4.	To Cook & McLean, 229	$18 67
	7.	To Drummond & Ford, 229	35 00
	12.	To Murphy & Boyd, 229	16 13
	17.	To Cutler, Wilbeck & Co., 229	6 95
	18.	To R. Meadowcraft, 229	2 25
	24.	To J. S. Reed, 229	20 60
	31.	To James L. Howe, 229	22 75
Nov.	1.	To William Lill & Co., 229	12 08
	7.	To William Thorn, 229	2 75
	14.	To Wm. Baragawauth, 229	8 00
100	19.	To C. R. Larrabee, 229	13 29
	27.	To J. J. Richards, 230	6 00
	30.	To McKeown & Quayle, 230	2 75
Dec'r	2.	To S. B. Walker, 230	50 00
	9.	To Buel, Hill & Granger, 230	7 55
	14.	To Edw'd Kelly, 231	4 00
		James Marks, 231	16 22
		Jas. Ludwig & Co., 232	25 00
		Philip Gouley, 234	13 75
	24.	To Drummond & Ford, 234	5 00
	31.	To Downer, Bemis & Co., 236	7 75
		Lemuel Barber, 237	13 00
		R. J. Hunt, 238	13 52
		Drummond & Ford, 238	4 50
		Chapin & Fox, 238	37 05
		James A. Smith & Co., 238	14 14
		bills receivable, 239	21 00
1862.			
April	1.	To Hugh Maher, 239	6 00
May	28.	To personal property, 240	70 00
June	1.	To John H. Reaf, 241	15 00
	14.	To ball. due you, 104	315 25
			805 95

1861.			
D'c'r	14.	By counter ch'g. on Dr. side, 232	$25 00
1862.			
May	17.	By H. Maher, c. ch'g., 240	6 00
	31.	By Kelly & Co., old ac., 241	137 11
Jan.	14.	By sundries, am't of, 242	628 24
		expense ac., 243	9 60
			805 95

1862.			
June	16.	To Crawford, Cross & Co., 243	$314 12
		personal property, 243	1 13
			315 25
1862.			
June	14.	By ball. brought down	315 25

Fifth. The following account of Edward Kelly, to wit:

1860.		Dr.	
April	21.	To cash, 3	5 00
May	19.	Do., 9	99 00
	31.	Do., 13	90 25
June	15.	Do., 17	46 75
	30.	To Erie coal, 18	2 77
		Lackawana, 18	7 00
		cash, 20	138 93
July	31.	To cash, 29	176 82
Aug.	31.	To Lacawana, 30	21 00
		Do., 31	9 36
		cash, 36	93 50
Sept.	30.	To Chippewa, 42	3 16
		cash, 49	50 50
Oct.	31.	To cash, 65	245 42
		Do., 66	
Nov'r	30.	To B. Hill, 71	5 00
		cash, 78	170 53
D'c'r	31.	To B. Hill ac., 83	5 00
		cash ac., 90	299 45
1861.			
Jan.	9.	To Chip. ac. Mrs. Kelly, 97	5 00
	23.	To Packard, 106	3 00
Feb'ry	1.	To B. Hill for Schlester, 113	3 20
	8.	To cash, 118	8 00
	14.	To Town & Waite, 122	6 00
		Carried over.	

Brought from preceding page:

Febr.	15.	By Town & Waite, 122	600 00
	18.	By cash, 124	5 00
102	22.	Do., 127	3 00
	28.	By Hollister & Wilkins, 130	35 50
M'ch	1.	By cash, 131	2 00
	2.	Do., 132	5 00
	5.	Do., 134	25 00
	7.	By Mrs. McDonald, 135	2 75
	8.	By Aigginson, 136	10 50
	14.	By sundries, 139	6 75
	16.	Do., 140	5 00
	18.	Do., 141	17 99
	29.	Do., 149	3 00
	30.	Do., 141	2 75

April	9.	By sundries 155	$2 80
	10.	By B. Hill ac't, 156	1 25
	13.	By 100 Washington s't, 158	2 99
		Am't to fo. 26	1, 634 42

1860. Cr.

April	21.	By cash, 2	32 00
	19.	Do., 7	123 75
	31.	Do., 11	135 00
		Do., 11	10 00
June	30.	Do., 20	30 00
July	31.	Do., 27	73 00
Aug.	31.	Do., 34	125 00
Sept.	30.	Do., 45	300 00
Oct.	31.	Do., 63	761 54
Nov.	30.	Do., 77	90 00
Dec.	31.	Do., 88	13 00
1861.			
Jan.	17.	By cash, 104	44 58
	18.	Do., 104	30 27
Feb.	7.	Do., 117	11 00
		Am t to fo. 26	1, 779 14

1861.

April	13.	To am't forward, 22	1, 634 42
	16.	To cash, 160	18 50
	19.	Do., 162	10 00
	20.	Do., 163	1 25
	25.	Do., 166	2 00
May	6.	Do., 172	4 00
	10.	Do., 175 and 9	40 76
	11.	To B. Hill, 176	4 50
	13.	Do., 176	22 22
103	May 17.	To sundries, 178	23 75
	June 3.	To cash, 184	10 00
	12.	To sundries, 187	19 25
	17.	Do., 190	5 00
July	5.	To bills pay., 196	30 00
		Osburn & Bros., 196	100 00
	6.	To cash, 196	5 00
	16.	Do., 199	6 50
	24.	To Jno. McAuley, 202	40 00
Aug.	3.	To Briar Hill acc't, 210	18 00
Sept.	12.	To Wright & Currier, 216	5 00
		Lehigh coal ac., 218	394 16
		sundries, am't of, 218	27 75
		same, 218	360 57
		prop't Montezuma, 219	37 35
		sundries, 220	11 05
		express ac., 222	132 19
		Briar Hill ac., 227	6 00
Oct'r	4.	To Joseph Hogan, 229	14 00
		Cook & McLean, 229	1 25
		Cutler & Whitbeck, 229	1 30

Dec'r	14.	To Thompson & Kenedy, 232	$51 39
		sundries p'r journal, 232	1,349 63
		Coan & Tenbrock, 231	78 98
	26.	To Bowers & Co., 235	125 69
		James A. Smith & Co., 235	74 46
	31.	To J. S. Saberton, 235	25 00
104		Mat. Couley, 236	176 28
		Downer, Burnes & Co., 236	38 25
		Thomas McKin, 237	24 01
		Chapin & Fox, 238	225 00
		profit and loss ac., 239	132 19
1862.			
April	1.	To Doc't Whitney, 239	30 00
	28.	To Savage & Bro	15 00
			5,331 65

1861.			
April	13.	By am't for'd, 22	1,779 14
		cash, 158	47 25
May	17.	By Jno. McAuley, 178	40 00
	26.	By N. P. Payne, 181	7 75
June	15.	By A. B. Meeker, 189	9 00
July	8.	By cash, 197	90 00
	18.	By sundries, 200	36 00
	25.	By cash, am't of, 208	15 00
Dec'r	14.	By George H. Quigg, 231	4 00
			2,028 14

1862.			
May 31.		T. am't from page 26	$5,331 65
June 1.		J. S. Saberton, 241	179 06
		Holbrook & Co, 242	48 00
		propeller Backus	140 00
			5,698 71

1862.			
May 31.		By am't from page 26	2,028 14
		By Drummond & Ford, 241	14 00
June 1.		By Lacawana coal ac., 241	179 06
	14.	By Ballance ac., 104	3,477 51
			5,698 71

1862.			
June 14.		To ball. bro't down	3,477 51
			3,477 51

1862.			
June 16.		By profit and loss, 243	1,362 85
		ball. carried down, 104	2,114 66
			3,477 51

1862.			
June 16.	To ball. bro't down		$2,114 66
1862.			
June 16.	By cash for desk, 234		16 00

Sixth. The following cash account, to wit:

1860.		Dr.	
April	21.	To sundries, 2	$92 89
	28.	Do., 4	159 49
May	19.	Do., 7	938 72
	31.	Do., 12	600 50
June	15.	Do., 16	630 54
	30.	Do., 20	1,161 04
105	July 31.	Do., 25	530 26
		Do., 26	2,648 20
August	31.	Do., 33	1,651 10
		Do., 37	89 71
Sept.	30.	Do., 44	3,371 43
Oct.	31.	Do., 59	4,449 06
Nov'r	30.	Do., 74	2,552 11
Dec'r	31.	Do., 86	2,015 04
1861.			
January	2.	To Chippeway ac't, 93	9 00
	3.	Do., 94	9 57
		Do.	5 00
	4.	To B. Hill, 95	4 75
	5.	To same, 96	10 00
	7.	To Chippewa B. H., 96	11 00
	8.	Do., 97	51 00
	10.	To B. Hill ac, 98	5 00
	12.	To Chippewa ac., 79	1 90
	14.	To sundries, 100	12 00
	16.	To Chip. coal ac., 101	17 65
		Jas. Ludwick & Co., 101	55 00
	16.	To H. S. Newell, 102	39 75
		Sundries, 103	431 95
	17.	To E. Kelly, 104	44 58
		Chippewa ac., 103	10 00
	18.	To sundries, 104	33 48
	19.	Do., 104	9 41
106	21.	Do., 105	16 00
	22.	Do., 106	156 35
	23.	Do., 107	24 25
	24.	Do., 107	122 75
	25.	Do., 108	23 28
	26.	Do., 109	125 85
	28.	Do., 110	72 09
	29.	Do., 111	67 13
	31.	Do., 112	6 00
Am't to folio 66			22,305 80

Cr.

1860.			
Apr. 21.	By sundries, 2		$26 65
28.	Do., 5		29 85
May 19.	Do., 9		890 80
31.	Do., 13		812 60
June 15.	Do., 17		294 58
30.	Do., 20		903 66
July 31.	Do., 27		3,638 14
Aug. 31.	Do., 35		1,717 47
Sept. 30.	Do., 47		3,509 39
Oct. 31.	Do., 64		4,419 08
Nov. 30.	Do., 78		2,123 75
D'c'r 31.	Do., 89		2,480 55
1861.			
Jan. 31.	Do., 102 and 3		966 79
26.	Do., 110		67 50
28.	By Lacawana ac., 110		5 25
29.	By sundries, 111		398 00
30.	By cash, 112		20 00
Feb. 5.	By Jas. O'Leary, 115		10 00
			22,314 05
1861.			
Febr. 1.	To am't for'd, 30		22,305 80
1.	To sundries, 113		33 46
2.	Do., 114		150 09
4.	Do., 115		369 68
5.	Do., 116		35 85
6.	Do., 116		16 00
7.	Do., 117		29 29
8.	Do., 118		18 75
9.	Do., 120		188 91
11.	Do., 121		34 01
13.	Do., 122		3 60
15.	Do., 122		3 60
16.	Do., 123		24 25
18.	Do., 124		21 00
107 19.	Do., 125		12 59
20.	To Briar Hill ac't, 126		5 00
21.	To sundries, 126		15 25
22.	To Cook & McLean, 127		3 00
25.	To sundries, 128 and 9		236 16
26.	Do., 129		8 50
27.	Do., 130		6 50
28.	Do., 130		35 00
M'ch 1.	Do., 131		36 50
2.	Do., 132		24 50
3.	Do., 132		14 50
5.	Do., 133		77 75
6.	Do., 134		178 20
7.	Do., 135		88 62
8.	Do., 135		37 25
9.	Do., 136		56 00
11.	Do., 137		5 38

M'ch	12.	To sundries, 137	$6 00
	13.	Do., 138	9 50
	14.	Do., 138	12 25
	15.	Do., 139	30 00
	16.	Do., 140	4 50
	18.	Do., 141	67 75
	19.	Do., 142	6 75
	20.	Do., 143	92 98
108	21.	Do., 144	50, 50
	22.	Do., 145	22 00
	23.	Do., 145	1 50
	25.	Do., 146	32 25
		Am't to folio 72	24, 416 26

1861.			
Feb.	1.	By am't for'd, 30	23, 314 05
	1.	By S. Kelish, 113	1 46
	2.	By sundries, 114	46 00
	7.	Do., 117	7 00
	8.	Do., 118	572 21
	9.	Do., 120	171 30
	12.	By N. S. Payne, 121	5 00
	15.	By sundries, 123	3 45
	16.	Do., 124	39 75
	18.	Do., 124	10 40
	22.	Do., 127	8 00
	23.	Do., 127	20 10
	25.	To N. P. Payne, 129	15 00
	26.	To sundries, 129	3 55
	27.	Do., 180	15 55
	28.	Do., 130	20 09
M'ch	1.	Do., 131	2 50
	2.	Do., 132	
	2.	Do., 132	26 00
	3.	Do., 132	1 00
	5.	Do., 134	565 00
	8.	Do., 136	94 00
	13.	Do., 138	4 50
	14.	To E. Kelly, 139	2 00
	16.	To same, 140	13 00
	18.	Do., 141	17 99
	19.	Do., 142	2 20
	20.	To expense, 143	1 50
	23.	To sundries, 145	9 50
			23, 881 81

1861.		Ballance Cr., 66	24, 416 26
March	26.	To sund., 147	28 75
	27.	Do., 147	8 88
	29.	Do., 149	13 50
	28.	Do., 148	27 09
	30.	Do., 150	86 55

April	1.	To sund., 151	$15 90
	2.	Do., 152	10 00
	4.	Do., 153	4 50
	6.	Do., 154	49 15
	8.	Do., 155	9 63
	9.	Do., 155	50 75
	10.	Do., 156	2 50
	11.	Do., 157	26 14
	12.	Do., 158	7 78
	13.	Do., 158	210 22
	15.	Do., 159	148 25
	16.	Do., 160	23 40
	17.	Do., 161	11 50
	18.	Do., 161	23 87
	19.	Do., 162	5 50
	20.	Do., 163	36 56
	22.	Do., 164	28 00
109	23.	Do., 165	20 25
	24.	Do., 165	1 50
	25.	Do., 166	13 50
	26.	Do., 166	41 71
	27.	Do., 167	2 50
	30.	Do., 167	4 00
May	1.	Do., 168	6 25
	2.	Do., 169	3 75
	3.	Do., 169	2 75
	4.	Do., 170	118 52
	6.	Do., 171	200 28
	7.	Do., 172	209 65
	8.	Do., 173	13 75
	9.	Do., 174	33 25
	10.	Do., 175	26 00
	11.	Do., 176	213 08
	13.	Do., 176	161 75
	14.	Do., 177	2 75
	15.	Do., 177	6 50
	60.	Do., 178	6 50
		To am't to folio 83	26, 332 92

1861.		Ballance, 66	23, 891 81
March	26.	By cash, 147	527 90
	27.	By sundries, 148	123 50
	30.	Do., 150	23 75
April	5.	Do., 153	16 00
	6.	Do., 154	18 00
	8.	Do., 155	8 00
	9.	Do., 155	34 50
	11.	Do., 157	8 25
	12.	Do., 158	12 50
	15.	Do., 159	29 00
	16.	Do., 160	18 50
	18.	Do., 162	3 20
	19.	Do., 162	11 10
	20.	Do., 163	30 28

April	25.	By sundries, 166	$22 25
	29.	Do., 167	33 00
May	2.	Do., 169	102 25
	3.	Do., 169	45 00
	4.	Do., 171	17 75
	6.	Do., 172	569 00
	7.	Do., 173	10 00
	8.	Do., 173	56 80
	9.	Do., 174	7 00
	10.	Do., 175	32 00
	11.	Do., 176	49 28
	13.	Do., 177	17 22
	15.	Do., 177	6 75
		By am't to folio 83	25, 724 29
May	17.	To am't from fo. 92	26, 332 92
	17.	To sundries, 178	2 70
	18.	Do., 179	3 87
	20.	Do., 179	9 25
	21.	Do., 180	2 75
	22.	Do., 180	8 50
	23.	Do., 181	11 10
	24.	Do., 182	2 50
110	25.	By B. Hill's ac., 1	4 14
	28.	By Chas. Wade, 183	2 75
	31.	By Lacawana ac., 184	3 75
June	1.	By Chip., 184	2 50
	3.	By B. Hill's acc't, 184	1 00
	6.	Do., 186	5 00
	10.	By Murphy B., 186	15 14
	10.	By B. Hill's acc't, 187	4 75
	11.	By sundries, 187	71 73
	14.	Do., 188	40 75
	17.	Do., 190	57 50
	21.	Do., 191	22 00
	22.	Do., 192	33 50
	26.	Do., 193	4 00
	29.	Do., 193	43 12
July	1.	By Hill's acc't, 194	5 00
April	5.	By sundries, 153	20 50
July	2.	By Magdelen Assylum, 195	10 13
	3.	By O. Lunt, Mo., 195	25 00
	8.	By Chip. acc't, 196	2 50
	8.	By sundries, 197	91 50
	9.	By Chip. acc't, 197	2 50
	10.	Do., 197	1 25
	11.	Do., 198	2 00
	12.	Do., 198	91 85
	15.	By Briar Hill's ac., 199	2 25
	16.	By Cook McLean, 200	4 75
	19.	By Chipewa acc't, 211	1 25
111	20.	By Thomas Kimby, 201	40 00
	20.	By Chipewa ac., 203	1 50
	23.	By error ledger, page 66, 204	2 92

July	23.	By error corrected, 204	$56 50
	23.	By error corrected, 204	5 50
	23.	By Chapin & Fox, 205	90 00
	23.	By Bowers & Co., 205	2 38
		Transferred to page 92	27, 144 70
May	17.	By am't from folio 72	25, 724 29
	20.	By sundries, 180	15 50
	22.	Do, 180	404 62
	23.	By N. P. Payne, 181	25 00
	24.	Do., 182	7 00
	25.	By sundries, 182	18 40
	29.	Do., 183	8 00
June	1.	By J. O'Leary, 184	2 80
	3.	By E. Kelly, 184	10 00
	4.	By James Fleming, 185	4 00
	6.	By sundries, 185	11 50
	8.	Do., 186	15 00
	11.	Do., 187	67 00
May	12.	Do., 169	19 47
	15.	Do., 189	40 00
	17.	Do., 190	37 00
	20.	By J. O'Leary, 191	10 00
	21.	By sundries, 191	102 87
	22.	Do., 191	25 00
	24.	Do., 192	5 00
	29.	Do., 193	37 00
	29.	Do., 194	3 03
July	2.	Do., 195	4 00
	3.	Do., 195	10 00
	4.	Do., 196	11 00
	6.	Do., 196	40 00
	8.	Do., 197	8 29
	9.	Do., 197	90 00
	12.	Do., 198	14 12
	13.	Do., 199	15 50
	15.	Do., 199	2 00
	15.	By folio 159	7 60
	16.	Do., 199	19 50
	19.	By James Fleming, 201	1 00
	20.	By sundries, 201	20 00
	24.	By C. C. & Co., 202	22 00
	22.	By sundries, 202	26 00
	23.	By error corrected, 204	26 62
	23.	Do., 204	10 00
		Transferred to page 92	26, 919 81

1861.

July	23.	By am't from page 83	27, 144 70
		Scatts, McAllister & Co., 207	5 00
		same (March 4), 207	39 56
		Jas. Cavanah, 207	3 00
	25.	To sundr's p'r journal, 208	18 75

Aug.	3.	To Chippewa coal ac., 210	$0 75
	5.	To sundr's, am't of, 210	204 43
	13.	To Crawford, Cross & Co., 211	10 00
	16.	To J. Ludwig & Co., 212	15 00
	17.	To Murphy & Boyd, 212	25 00
	20.	To Thompson & Kenedy, 213	40 00
	21.	To sundries, am't of, 213	248 32
	26.	To Chipaway coal, 213	4 00
	28.	To same, 213	2 25
Sept.	11.	To Foster Home, per journal, 215	5 00
Nov.	27.	To J. J. Richards, 230	2 50
	30.	To McKeown & Quayle, 230	3 29
Dec.	11.	To O. Lunt & Bro., 230	46 54
		Hamill & Reynolds, 231	13 75
	14.	To A. Ludwig, 232	3 00
		sundries from journal, 233	494 22
112		26. To Doctor Homes, 235	18 72
		26. To H. S. Newell, 235	26 76
	31.	To S. B. Walker, 236	5 50
		bills receivable, 236	50 00
		R. Pendeville, 237	200 00
		R. Pendeville, 237	10 75
		J. A. Smith & Co., 238	113 20
		Do., 238	48 00
1862.			
May	17.	To John Jones, 240	15 00
	28.	To Briar Hill coal ac., 240	11 00
	31.	To Orient House, 241	6 00
June	1.	To J. S. Saberton, 241	42 22
		John R. Hodson, 242	5 00
			28, 881 21

1861.			
July	23.	By am't from page 83	26, 919 81
		deductions, Saberton, 208	5 00
	25.	By Crawford, Cross & Co., 208	15 00
Aug.	5.	By sund., journal, 210	40 00
	10.	By same, 211	92 87
	13.	By same, 211	22 25
	16.	By J. Fleming, 212	15 00
	18.	By expense ac., 212	3 40
	19.	By J. O'Leary, 212	10 00
	21.	By J. Fleming, 213	10 00
	29.	By same, 214	16 00
Sept.	7.	By expense ac., 214	19 50
	9.	By J. O'Leary, 214	15 00
	10.	By same, 215	15 00
Nov.	11.	By Drummond & Ford, 230	334 32
Dec.	14.	By W. W. Drummond, 234	130 00
	31.	By sund. contra charge, 236	50 00
1862.			
May	28.	By sundries, 240	11 00
Jan.	14.	By bal. ought to be on hand, 104	1, 157 06
			28, 881 21

1862.			
June 14.	To bal. cash, 242		$1,157 06
16.	To sundries, 243		25 23
	Samuel Straus, 243		3 00
	George W. Higinson, 243		4 75
	personal property, 244		7 00

EXHIBIT G.

The cash-book contains the following acc'ts, entered by said Quigg
113 subsequent to Sept. 13th, 1861, to wit:

1861. *Cash.*

July 25.	To Chippewa ac. for ¼ ton		$1 25
	Chippewa acc't, rec'd from Jos. Patricks for ¼ ton		2 50
	E. Kelly, for money paid Mr. Cross		15 00
Aug. 3.	To Osborne, Bro. & Co., rec'd from them on ac		50 00
5.	To steamer Michigan, rec'd her full am't of bill		137 93
	Jos. Ludwig & Co., rec'd from them on ac		15 00
	Chippewa ac., rec'd for ½ ton screenage		1 50
13.	To Crawford, Cross & Co., rec'd for their wagon		10 00
16.	To rec'd from Jos. Ludwig on ac		15 00
17.	To Murphy & Boyd (rec'd and posted by Kelly)		25 00
20.	To Thompson & Kenedy, rec'd from them on ac		40 00
21.	To Osborne & Bro., rec'd from them on ac		100 00
114 Aug. 21.	To pro. Bachus, rec'd on ac		143 32
	Briar Hill ac		13
	rec'd from Kirchoff for 1 ton		5 00
Oct. 2.	To Briar Hill coal, rec'd for screenage by Flemming		11 00

1861. *Cash.*

July 23.	By Lacawana acc't, for am't p'd for extra cart to solg		5 00
24.	By N. P. Payne, p'd him on ac		15 00
	Crawford, Cross & Co., for tran. ex. N. P. P		11 00
25.	By Crawford, Cross & Co., paid Mr. Cross		15 00
Aug. 3.	By Jos. Flemming, p'd him on ac		10 00
	John O'Leary, p'd him on ac		15 00
	expense ac. p'd F. Forman for copying papers in Bull case		15 00
10.	By expense ac. p'd Eli Cook, of Buffalo, for attending suit of Bull		50 00
	A. Lantergny, p'd A. B. Meeker for ½ ton Blosbury coal for him		3 00
	Crawford, Cross & Co., p'd J. McDonald for docking and keeping house		39 85
13.	By p'd Crawford, Cross & Co. for wagon		10 00
	John O'Leary, p'd him on ac		11 25
	expense acc't p'd for postage stamp		1 00
16.	By p'd Jas. Flemming on ac		15 00
18.	By expense ac. p'd for coaling pro. Backus		3 40
19.	By p'd John O'Leary on ac		10 00
21.	By Jas. Flemming, p'd him on ac		10 00
29.	By p'd Jas. Flemming in full		16 00
Sept. 7.	By expense ac. p'd Hugh Taly in full		19 50
9.	By John O'Leary, p'd him on ac		15 00
	paid check No. 142, given to John O'Leary May 3d, by N. P. Payne, without having funds in the bank, of E. T. Tinham		45 00

Sept. 10.	By p'd John O'Leary on ac. for wood	$15 00
Oct. 2.	By cartage, &c., other labor p'd by Flemming	2 50
	W. W. Drummond p'd him on ac. by do	8 50

115 *Briar Hill and Chippewa coal accounts.*

EXHIBIT F.

The coal register showed the amount of each kind of coal sold, and the name and amount sold to each purchaser. These were entered on said register of sales of Briar Hill coal—

For the month of	Sept., 1860, 519 1472-2000 tons for	$2, 205 02
	Oct., 438 960-2000 tons, for	2, 119 35
	Nov., 346 382-2000 tons, for	1, 670 06
	Dec., 287 1960-2000 tons, for	1, 333 25
	Jan., 1861, 329 595-2000 tons, for	1, 559 62
	Feb., 172 590-2000 tons, for	820 10
	Mar., 176 1019-2000 tons, for	820 73
	Apr., 142 275-2000 tons, for	596 22
	May, 136 837-2000 tons, for	605 09
	June, 29 456-2000 tons, for	140 36
	July, 21 725-2000 tons, for	98 46

There were also on said coal register sales of Chippewa coal—

For the month of	Aug., 1860, 15 300-2000 tons, for	59 63
	Sept., 69 1740-2000 tons, for	263 25
	Oct., 147 200-2000 tons, for	701 03
	Nov., 169 855-2000 tons, for	812 75
	Dec., 128 1415-2000 tons, for	638 63
	Jan., 1861, 125 1100-2000 tons, for	625 54
	Feb., 56 1968-2000 tons, for	280 91
	Mar., 105 610-2000 tons, for	521 21
	Apr., 118 595-2000 tons, for	557 84
	May, 85 1965-2000 tons, for	381 42
	June, 79 695-2000 tons, for	357 30

116 EXHIBIT D.

The journal contained entries of coal furnished by plaintiffs as follows, to wit:

Aug. 30.	204 tons Briar Hill coal, at $2 95	$601, 80
Sept. 30.	403 1734-2000 tons do., 3 00	1, 211 60
	286 577-2000 tons do., 3 00	858 86
	288 tons do., 3 00	864 00
Oct. 31.	415 tons do., 3 00	1, 353 00
June 24.	1861, 343 900-2000 tons do	507 25
Sept. 30.	443 41-2000 tons Chippewa coal, 2 60	1, 151 87
	250 tons do., 2 60	650 00
	417 tons do., 2 60	1, 084 20
Oct. 31.	300 tons do,, 2 60	780 00
Nov. 30.	325 tons do., 2 60	845 00
	350 tons do., 2 60	910 00
Dec. 24.	187 600-2000 tons do., 2 60	476 58

But to the introduction of said books and the reading of the same in evidence, and the balance account therein contained, the said def't Hugh Maher, by his counsel, did then and there object, first, because it appeared by the

deposition of the said Quigg that all the entries in said books made subsequent to the 24th July, 1861, were made and entered upon said books by said Quigg subsequent to the time said books were submitted to him under the contract offered in evidence by the pl'ffs, and marked Exhibit A, and that original entries were made on said books by said Quigg subsequent to the time said books were submitted to him under said contract, and that
117 said Quigg by the said contract, under which the books were submitted to him had no authority to make additions or alterations in said books; and second, because according to the terms of the agreement marked Exhibit A, and offered in evidence by the pl'ffs, the said Quigg was to make up the account and find the balance from the books, and that said Quigg, instead of doing that, had altered said books, and changed them and made new accounts and additional entries in the same, and had inserted new and additional matter in said books, and in making up said balance account had included said new and original matter entered in said books by him, which objection of the said def'ts by his counsel to the introduction of said books as evidence for the reason aforesaid, the said court then and there overruled, and decided that said books might be read, and allowed the same to be read by the pl'ffs in evidence to the jury as exhibits referred to by Quigg, and in connexion with and explanatory of his deposition; to which decision of the said court in overruling the said objection of said def'ts and allowing said books to be read in evidence to the jury, the said def't Hugh Maher, by his counsel, did then and there duly except. And the said pl'ffs, by their counsel, thereupon read to the jury from said books thus introduced in evidence by the pl'ffs, and admitted by the court against the objections of the said def't Hugh Maher, as aforesaid, the Briar Hill and
118 Chippewa coal account, on pages 80 and 81 aforesaid; the account of Crawford, Cross & Co., on pages 64 and 65 aforesaid, and the balance account, on pages 61, 62, and 63 aforesaid; and the said def't Hugh Maher, by his counsel, then read to the jury from the said books thus introduced by the pl'ffs in evidence and admitted by the court against the objection of the said defendants, the following accounts, to wit: all the balance of the foregoing accounts, to wit: the said entries by said Quigg on the day-book, to wit: the entries on pages 38 to 56, inclusive, aforesaid; the entries by said Quigg on the journal referred to, on pages 57 and 58, aforesaid; also the entries on page 59 not taken to balance account; also the account of Drummond & Ford on page 66 aforesaid; also the account of George H. Quigg, on pages 67 and 68 aforesaid; also the account of Edward Kelly, on pages 69, 70, 71, and 72 aforesaid; also cash account on pages 73, 74, 75, 76, 77, 77a, 77b, 77c, aforesaid; also the entries made by Quigg in the cash-book, on pages 78 and 79 aforesaid.

And the said def't Hugh Maher then, to maintain the issue on his part, by consent of said pl'ffs, by their counsel, read in evidence to the jury the deposition of W. W. Drummond upon his direct examination, in words and figures following, to wit:

119 United States circuit court for the northern district of Illinois.

LEMUEL CRAWFORD *et al.*
vs.
HUGH MAHER *et al.*

Testimony of William W. Drummond for def't Maher, taken before Daniel Goodwin, jr., U. S. commissioner.

First and second interrogatories in usual form.

Third. Do you know of any business transactions between the plaintiffs and defendants in this suit? If yea, state fully all you know touching the same.

(*Note.*—Mr. Munroe here interposes an objection to said interrogatory, and to each and every portion of the answer to the same.)

Ans. I know that the plaintiffs and defendants were engaged in business connected with the coal trade in Chicago. I think the business commenced in May, 1860. To what extent they did business in connection with the coal trade, I don't know. In January, 1861, a large quantity of coal in the possession of Kelley & Co. was levied upon under an execution from the superior court of Chicago in favor of Cadwallader Bull, of Buffalo, New York. Soon thereafter the coal was replevied from the sheriff by Crawford, Cross
120 & Co., the pl'ffs in this suit. Upon the trial of the replevin case the judgment was in favor of the plaintiff, Crawford, Cross & Co. About that time Mr. Maher, of Kelly & Co., was anxious to and insisted upon getting out of the coal business entirely, and upon the tenth of January, 1861, an agreement was made between Kelly & Co. and the plaintiffs and def'ts in this suit, which is attached hereto, marked Exhibit No. 1.

In pursuance of that agreement Crawford, Cross & Co., by Nathan Paine, took possession of all the coal and other property in the possession of Kelley & Co. that were furnished by the plaintiffs, and other property in the possession of the defendants, to secure the amount due from the defendants to the plaintiffs. In a conversation immediately subsequent to that, Hugh Maher, one of the defendants, told Mr. Cross, one of the pl'ffs, that if he took possession of the coal and the books of accounts of the office showing the outstanding indebtedness, that he must take them in full satisfaction of all claims against the defendant Maher. Mr. Paine, their agent and bookkeeper, had the control of all the coal and all the business transactions connected with it, as far as I know or ever heard, until the month of September following. In September, 1861, Mr. Cross was in the city of Chicago and wished Mr. Maher to guarantee or secure the payment of a balance that he claimed to be due for coal furnished to the defendant Kelley & Co. Maher positively refused to pay or secure anything, alleging that he had de-
121 livered all the coal on hand, and books of account, and other property about the coal yard, in full satisfaction of all claims the plaintiffs had against him at that time. This business transaction took place in my office, Mr. Maher stating very positively that he wouldn't pay any more, that he had complied with his agreement, and that they had taken the property afore mentioned in full satisfaction of all claims against him. Mr. Cross wished him to sign an agreement guaranteeing the payment of some outstanding accounts for coal sold by Kelly & Co., and he refused, alleging that in January or February preceding they had taken the accounts, together with the other property, in full satisfaction of all claims against him. Capt. Edward Kelley was present at the same time, with whom an agreement was made by Mr. Cross. The said agreement is hereto attached, marked Exhibit No. 2, and was signed by Cross for Crawford, Cross & Co., and by Kelly for Kelly & Co., claiming to act for Kelly & Co. That was done without Mr. Maher's knowledge or consent, and after he had in advance refused to sign any such agreement, and had repudiated any such proposition, although Cross and Kelly agreed to make such an agreement, I told them I did not think the agreement would be binding on Mr. Maher, for the reason that the copartnership between Kelly & Maher had been dissolved the previous May.

In pursuance of that agreement, the books of account were left with me and my partner to collect the indebtedness upon the books for Crawford, Cross & Co., which we proceeded to do as far as we could for them.
122 Thereupon, by consent of counsel, the farther examination of the witness was adjourned to 10 o'c. a. m., on Saturday, the eleventh day of July.

D. GOODWIN, JR., *U. S. Comm'r.*

July 11, 10 o'c. a. m.—The parties met pursuant to adjournment, and the following interrogatories were put, to wit:

Fourth interrogatory. In answer to the third interrogatory you state that in pursuance of the agreement referred to in said answer as Exhibit No. 1, the plaintiff took possession of the coal accounts, property, &c., of Kelly & Co., to secure the indebtedness of pl'ffs to def'ts. Please examine said agreement and then state whether the said property and assets of defendants were taken possession of by the pl'ffs in pursuance of said agreement; and if not, why was possession delivered to the pl'ffs?

Answer. In pursuance of that agreement (the additional article of agreement) Crawford, Cross & Co., by Mr. Paine, their agent and representative, took possession of the coal sent there as the property of Crawford, Cross & Co., and afterwards, in the month of February or March, and after a farther interview between Mr. Cross, of the firm of Crawford, Cross & Co., and Hugh Maher, of the firm of Kelly & Co., they received the other fix-
123 tures and property connected with the coal yard, which I understood from the conversation between them, to consist of the coal carts, coal screens, in fact, I believe all the property about the office, except a safe, which I believed belonged to Mr. Maher, and which he refused to let go, including the books of account and outstanding indebtedness, to be applied in satisfaction of any liability by Maher to Crawford, Cross & Co., Maher then telling Mr. Cross that if he took the property and assets, it must be with the understanding that he, Maher, must be released from any liability. I was not present myself, but understood that they took possession of the property at *at* that time, and have controlled it ever since.

Fifth interrogatory. State whether in the conversation referred to in the last interrogatory between Cross, of Crawford, Cross & Co., and Maher, of Kelly & Co., said Cross made any objection to the proposition or statement of said Maher, and whether he assented to the same in any way.

Answer. I don't think he made any objection to it. I think Cross at that time thought there was property, coal, money, &c., enough on hand to pay them.

Sixth interrogatory. In answer to the third interrogatory you say that at the interview previous to the time of the execution of the agreement, referred to as Exhibit No. 2 of said answer, that Cross wished Maher
124 to sign an agreement guaranteeing the payment of the outstanding accounts for coal sold by Kelly & Co., and that Maher refused, alleging that in February or January preceeding, they, to wit, the plaintiffs, had taken the accounts, together with the other property, in full satisfaction of all claims against them. State, if you recollect, what, if any, response was made by said Cross to allegation of said Maher.

Ans. Mr. Cross said that notwithstanding that might have been the case, they, Kelly & Co., had the coal of Crawford, Cross & Co., that they had disposed of it or a great deal of it, and had made some bad debts, and thought in justice and equity Mr. Maher ought to pay it.

Seventh. State who was present at the time of the making and execution of the agreement referred to as Exhibit No. 2 in answer to the third interrogatory.

Answer. I don't think any person was present except Mr. Cross, Kelly, and myself. Mr. Ford, who was then my partner, may have been present a part of the time, but I think not.

Eighth. What was said at the time of the execution or immediately before the execution of the last-mentioned agreement by Kelly and Cross?

125 Ans. Mr. Cross was very anxious to have his claim farther secured, and seemed to think there was not ample security in the property they had already. Kelly on his part alleged that there was a great deal

more standing out upon the books, and due from responsible parties than would pay all they owed Crawford, Cross & Co., and the expenses of collecting them, and there would be a very considerable sum left for Kelly & Co. Thereupon they made the agreement heretofore referred to. At the same time I told them both that as the partnership between Kelly and Maher had been dissolved they May previous, I thought it was doubtful whether Kelly could bind Maher by his agreement. Cross seemed to think that for the purpose of closing up a partnership concern like that it would be sufficient.

Ninth. In whose possession was said last-mentioned agreement left? And if in your possession, how long did it remain so?

Ans. I made duplicate copies. Mr. Cross took one and I kept the other, and I think I have it yet.

And the said pl'ffs then read in evidence, by their counsel, the further deposition of said W. W. Drummond, in his cross-examination, in words and figures following, to wit:

126 *Cross-examination by H. S. Munroe, esq., for def'ts.*

First cross-interrogatory. Were you not the attorney of Kelly & Co. during the time mentioned in your answers to the direct interrogatories? When did you commence acting for them, and when did you cease?

(Objected to as immaterial, by def'ts)

Ans. I had been acting as one of their attorneys, commencing, I think, in 1859. I think I ceased in the spring or summer of 1862.

Second. At the time of making the contract between Kelly & Co. and the plaintiffs referred to by you, marked Exhibit No. 2, for whom were you acting?

Answer. I understood I was acting for them mutually.

Third cross-interrogatory. At whose solicitation were the accounts mentioned put into the hands of Drummond and Ford, and what amount did you pay over upon such collections?

(Objected to as immaterial, by def'ts' att'y.)

Ans. The accounts were put into our hands by Mr. Kelly, and it was readily assented to by Mr. Cross. I believe some five or six or seven hundred dollars was paid over, but I really cannot say now without looking at my books, but I believe Mr. Ford collected three or four hundred dol-

127 lars which he did not pay over. There was also a large amount of money paid on costs for prosecuting the cases, and an additional amount paid to Mr. Quigg for investigating the *the* accounts. I cannot say how much.

Fourth cross-interrogatory. Did you not find that a very large proportion of these accounts placed in your hands for collection, and which were standing on the books as unpaid or unsettled, had been paid to Kelley & Co. or to some member of that firm?

Answer. I did find that a large or very considerable portion of them had been paid or otherwise settled by Mr. Kelley, and gave up trying to collect them by suit. I found little, if any, that had been collected by Maher.

Fifth int. In whose office were the books of Kelley & Co. left, and where did Mr. Quigg perform the duties of examination into said accounts, and ascertaining the balance of accounts between Crawford, Cross & Co. and Kelly & Co?

(Objected to by Mr. Nicholes as immaterial.)

Answer. The books were left at my office, and it was there Mr. Quigg performed his labor.

Sixth. With whom of the parties to this suit did Mr. Quigg consult most frequently while so at work?

(Objected to by def'ts' att'y.)

Answer. He consulted with Kelley the most, and it was very difficult for him to see him. Maher was in the office occasionally, but about that
128 time he had some suits in the Supreme Court, and used to talk with me mostly about them. Maher was away from home a good deal then, at Washington City.

Seventh cross-interrogatory. Did you not know that Maher was very frequently in the office consulting with Mr. Quigg about those accounts?

Answer. I did not; and know, in addition to that, he was away from the office for months at a time; still he was there very often, though not half as often as I wanted him to be. He always repudiated the contract and threatened to enjoin the collection of the debts if he was made liable in any way.

Eighth cross-interrogatory. Did he not on one occasion or more, in your presence, urge Mr. Quigg to hurry up the matter, and express himself anxious to have it closed so as to know how he stood and what to do with Kelley, or something to that effect?

Ans. He may have done it, but I have no recollection of any such thing.

Ninth cross-interrogatory. Did not, as a matter of fact, Mr. Maher oftener consult with Mr. Quigg than any other of the parties to this suit, and did not you understand from Mr. Maher after Mr. Quigg commenced that Mr. Maher consented to the arrangement?

Answer. I don't really know whether Mr. Maher ever consulted with
129 Mr. Quigg at all about the matter. Mr. Maher denounced it as a damned conspiracy between Crawford, Cross & Co. and Kelly to swindle him, and threatened to prosecute us all.

Tenth int. At this time were you acting for Kelly & Co., or for Crawford, Cross & Co.?

Ans. I was acting for Crawford, Cross & Co. in the collection of these accounts, and was general attorney for Kelley & Co. in a few other suits. I understood that the Nicholes were Maher's general attorneys.

Eleventh cross-interrogatory. Did you at any time after the statement of Maher to Cross, that Cross & Co. must take the property of Kelly & Co. in satisfaction of their claim against Maher, if at all, ever hold or express the opinion that Maher was nevertheless bound to pay Cross & Co. their claim?

(Objected to by def'ts' att'y.)

Ans. I don't know but I have.

Twelfth cross-interrogatory. Did you not in a letter to D. W. Cross, dated Sept. 23rd, 1861, at Chicago, in speaking of an arrangement to submit the matter to Mr Quigg, state that Mr. Maher, "after thinking the matter over, came to the conclusion that it was about right, and told us to go ahead and do the best we could. Mr. Quigg has been at work the entire past week, and it will take him all this week to finish the books?"

(Objected to by attorneys.)

130 Ans. I have no recollection, and can't say whether I did or did not without seeing the letter. The next day, or the next day but one, after the agreement between Kelley and Cross, Maher came into the office and asked me how we had fixed it the day before. I told him it was all right. Without any further talk or explanation he went away. I have no recollection of having any further talk with Maher upon the subject of that settlement until a few days after the commencement of this suit. I met him on the corner of Randolph and Dearborn streets, by Badger's Bank, and he was desperately excited, and said he had been sued by Crawford, Cross & Co., and that Kelley, Cross, and I had conspired together to swindle him, and that I had drawn up an article of agreement which had been signed by Kelley without letting him know anything about it.

Thirteenth cross-int. At the time mentioned in the next to the last cross-interrogatory, when Mr. Maher came into your office and asked what had been done, and you told him that it was all right, what did he then say?

Ans. I think he said he was glad of it, or something of that kind.

Fourteenth cross-interrogatory. Did you not, in a letter sent by you to Mr. D. W. Cross, from Chicago, dated November 4, 1861, use the following language, to wit: "Of course you will get your money, but the greater portion will come out of Hugh Maher?"

(Objected to by def'ts' att'ys.)

131 Ans. I may have done so. The letter will speak for itself, but I have no recollection of having done so.

Fifteenth cross-interrogatory. Did you not, in a letter, dated Chicago, Nov. 26, 1861, directed to Mr. Cross, in speaking of the reference to Mr. Quigg and the matters connected therewith, use the following language, to wit: "Mr. Maher is extremely anxious to have the matter closed up, so as to know how he stands and what to do with Kelly?"

(Objected to by def'ts as immaterial, &c.)

Ans. I don't know but I did. There was a time when Mr. Maher thought he ought to prosecute Kelley criminally for swindling him.

Sixteenth cross-interrogatory. Did you not, in a letter to D. W. Cross, dated Chicago, December 10th, 1861, in answer to a letter from Mr. Cross, in which he claims that Kelley & Co. had broken the agreement, use this language, to wit: "There seems to be a disposition to pay you fully before the time in the agreement expires, and both Kelly and Maher seemed disposed to stick to it, as they no doubt have a right to do?"

(Objected to by def'ts' att'ys.)

Ans. I may have so written, and may have had that impression, but I don't recollect.

132 Seventeenth cross-interrogatory. If you did write such letters using such language, would you have been as likely to know or more likely to have been then correct in your impressions as now?

(Objected to by def'ts' att'ys.)

Ans. I would have been as likely to have been then correct as now. It was not until some time after that I came to the conclusion that the debt of Crawford, Cross & Co. would not be paid by the assets.

Eighteenth cross-interrogatory. At that time, when all matters connected with this transaction were fresh in your mind, and when the carrying out of the transaction was in progress, would you not have been much more likely to be correct than now?

(Objected to by def'ts' att'y.)

Answer. Don't know that I would. Whatever statements I may have written to Mr. Cross in relation to the assets for some time after the execution of that agreement between him and Kelley were made with the belief, from the appearance of the books and the statements of Mr. Kelley and Quigg, that there would be ample to pay Cross & Co.'s debt.

Nineteenth cross-interrogatory. It was then the intention, was it, of Mr. Maher that if Mr. Quigg should find for him to stand by the agreement, and if he should find against him to repudiate it?

Answer. He never said anything of that kind to me. He never said anything to me on the subject of his liability in that contract.

133 Twentieth cross-interrogatory. At the different times these letters were written were you not, as far as these accounts were concerned, acting at least partly as the attorneys of Crawford, Cross & Co., and did not the contents of these letters express then your candid belief?

(Objection by def'ts' att'ys.)

Answer. I was acting as attorney for Crawford, Cross & Co., so far as the collection of these accounts were concerned, and whatever I wrote I doubtless believed to be true.

Twenty-first cross-interrogatory. During the time of all these transactions

was not Kelly by Mr. Maher, by yourself, and by Mr. Cross regarded as insolvent and worthless?

Answer. I think it was generally supposed that a debt could not be collected of him by process of law.

Twenty-second cross-interrogatory. Look at Exhibits Nos. 3, 4, 5, and 6, and state whether they were written by you and are the letters above referred to.

(Objected to as calling for transactions between the attorney and his clients.)

Ans. Those letters were written by me, and are, I presume, the ones referred to. These letters, and whatever letters I have written to Cross, were written without any consultation with Maher.

23rd cross-interrogatory. State whether or not did you become
134 the attorney of Crawford, Cross & Co., at the solicitation of Kelly or of Kelly & Co.

Ans. I did.

24th cross-interrogatory. How did Mr. Cross, or Crawford, Cross & Co., and yourself and Mr. Maher come to the conclusion that there was coal and accounts enough to pay Crawford, Cross & Co.'s account?

Ans. Personally, I knew nothing about the coal or books, or accounts; the other parties seem to have come to the conclusion from the appearance of the books.

25th cross-interrogatory. Who were the members of the firm of Kelly & Co., and who conducted the business?

Ans. Of Edward Kelley and Hugh Maher, Kelley was the active managing business man of the firm. The books and property of the concern from and after January, 1861, were in the possession of Crawford, Cross & Co., and under their control, by their agent and bookkeeper, H. P. Paine.

And the said def'ts further to maintain the issue on his part, then, by his counsel, read in evidence the further deposition of **W. W. Drummond,**
135 on his redirect examination, in words and figures following, to wit:

Redirect examination.

First redirect interrogatory. State whether Mr. Maher did not refer to claims against him as a member of the firm of Kelly & Co., and not to claims against him individually, in the conversation with Cross, referred to in the 3rd direct interrogatory.

Answer. The conversation had exclusive reference to the coal business. There was no pretense of any other claim against Mr. Maher, that I ever heard of.

Second redirect int. State whether in bringing the suits under that agreement you acted as the attorney of Crawford, Cross & Co.

Answer. I did, and sued in the name of Kelly & Co., *& Co.*, for Crawford Cross & Co.

Third redirect int. State whether in making collections you did not find that some of the accounts had been collected by Paine, the bookkeeper, for which no credits appeared on the books.

Ans. I know it was alleged that Paine had collected some items for which no credits had been made, and Paine said he would pay any such
136 claims.

4th redirect. State whether a large portion of the offsets to the claims that you were attempting to collect were not individual accounts *vs.* Kelly.

Answer. They either were or had been collected by Kelly.

5th redirect. Were you not entirely through with all business for the firm of Kelley & Co. before Maher was informed of the existence of the contract marked Exhibit No. 2?

Ans. I believe the last business I done for Maher was in the cases in the supreme court, which were decided at the April term, 1862. The first time that I was personally cognizant that he knew of the existence of the contract, was when we had the altercation near Badger's Bank last fall, a day or two after the commencement of this suit. I said nothing to Maher about the agreement, because I believed there was enough in the assets to pay the debt of Crawford, Cross & Co.

6th redirect. Did you sell the scales mentioned in said agreement No. 2, to Hugh Maher? And if so, as whose property did you sell them, and what was said at the time?

I did sell him the scales as the property of Crawford, Cross & Co., the 28th May, 1862. He gave as a reason why he wanted to buy the scales, that he was going to rent the coal yard to somebody else, and wanted
137 the scales to remain. Exhibit No. — is the bill of sale given.

W. W. DRUMMOND.

Subscribed and sworn to before me this 11th day of July, 1863.

DANIEL GOODWIN, JR., *U. S. Commissioner.*

Witness fees	$1 50
Com. fees for one oath	10
To certify to 50 folio of testimony, &c	10 00
	11 60

Com.'s fees $10 10, paid me by Messrs. Nicholes, att'ys for said defendant.

The said pl'ffs, further to maintain the issue on their part, by their counsel, the produced and offered to read in evidence the letters of said W. W. Drummond, annexed to his deposition, and marked Exhibits 3, 4, 5, and 6; which said letters are in words and figures following, to wit:

138 *Exhibit No. 4, D. Goodwin, jr.*

CHICAGO, ILLINOIS, *Nov. 4th*, 1861.

D. W. Cross, Esq., Cleveland Ohio:

DEAR SIR: I had expected to send you a hundred or two of dollars before this, but I find that nearly every bill I present has either been paid in full to Mr. Kelly, or that there are large set-offs to the accounts, which, of course, causes much delay in settling. Mr. Quigg says that he never saw books so recklessly kept in his life. Of course you will get your money, but the greater portion of it will come out of Hugh Maher. I ask, did you get a letter dated Oct. 11, 1861, containing one hundred dollars from us, and written by Mr. Ford? Also letter of enquiry as to said hundred dollars, dated Oct. 21, 1861, and written by Mr. Ford. I believe you have received and answered all of my letters, but of these or either of them I hear nothing. Please to answer to me at once, as I wish to ascertain where the hundred dollars is; if with you, I want a receipt of intercepts, I want to know that. I have not collected a dollar for you, save $25, for two weeks, and that goes to the book-keeper, at the rate of $100 p'r month. Will try to remit $100 this week.

I am, in haste, yours, &c.,

W. W. DRUMMOND.

139 *Exhibit No.* 3, *D. G., jr., com'r.*

CHICAGO, ILLINOIS, *Sept.* 23*rd*, 1861.

D. W. Cross, Esq'r.:

DEAR SIR: Yours of the 20th inst. was duly rec'd in my absence, but owing to Mr. Ford being sick, could not be answered until to day.

At first Mr. Maher seemed much dissatisfied with the arrangement, and said he would not stand it, nor allow the accounts to be collected, but after thinking the matter over he came to the conclusion that it was about right, and told us to go ahead and do the best we could. Mr. Quigg has been at work the entire past week, and it will take him all of this week to furnish the book. I fear he can't do it this week. He says he found many errors and expects to find more. As soon as he gets through we shall at once advise you, and also proceed to the collection as fast as we can. We got our German woman acquitted in Indiana, whom we defended for the murder of her husband; the labor and excitement prostrated Mr. Ford, and he is now dangerously sick, but we hope he will recover. We shall do the best we can for you and advise you from time to time. Would be pleased to hear from you often. Regards to Mr. Payne.

I remain, truly yours,

W. W. DRUMMOND.

140 *Exhibit No.* 5, *D. G., jr., comm'r.*

CHICAGO, ILLINOIS, *Nov.* 26, 1861.

D. W. Cross, Esq., Cleveland, Ohio:

MY DEAR SIR: Yours of the 23rd inst. was duly rec'd on yesterday, and in reply will say that we are making all the efforts in our power to collect the money, and in almost every, in fact in every, instance lately we have been met with counter demands against our friend Kelley. All the larger bills have been settled by him in some way long since and no credit given. We have now commenced a lot of suits to settle the question whether he can or could use the partnership property to pay his individual debts. You cannot realize more than $1,000 out of the assets of that. Mr. Maher is extremely anxious to have the matter closed so as to know how he stands and what to do with Kelly.

Will write often as occasion requires.

Fraternally, &c.,

W. W. DRUMMOND.

141 *Exhibit No.* 6, *D. G., jr., comm'r.*

CHICAGO, ILLINOIS, *December* 10, 1861.

D. W. Cross, Esq.:

DEAR SIR: Yours of the 5th inst. is rec'd and duly noticed and considered. I think from the recent turn of events that we will be able to realize much more than we did suppose a month ago. Have been compelled to sue quite a number, and will sue some more, and collect as fast as possible. We will also try as fast as possible to get an injunction dissolved in favor of Bull, and collect some large amounts there, and let you have the proceeds. At our rate there seems to be a disposition to pay you fully before the time in the agreement expires, and both R. and M. seem disposed to stick to it as they no doubt have a right to do. Did your Mr. Payne get $500 from Capt. Drake on a settlement made here last spring? I find no credit for it, and Mr. Kelley says he gave the notes to Mr. N. P., who got the money. Please write soon and let me know.

I am in great haste.

W. W. DRUMMOND.

Part of the money collected of Drake was used in buying the first one of the certificates of deposit now tied up on liquor; the balance Mr. K. used in buying wood, as he claimed it all of right belonged to him indivi-
142 dually, and not to the firm, as he was the one that proceeded against Drake, and not in the name of the firm.

To the reading of said letters the said def't Hugh Maher, by his counsel, then and there objected; which said objection the said court then and there sustained, and refused to allow said letters to be read as evidence against the said Maher, but allowed the same to be read to the jury for the purpose of impeaching the credibility of the said W. W. Drummond.

And the said plaintiffs, further to maintain the issue on their part, called as a witness Nathan P. Payne, who, being duly sworn, testified as follows, to wit:

Interrogatory. Where do you reside?

Ans. Cleveland, Ohio.

Int. Where did you reside in 1860?

Ans. At Cleveland.

Int. What was your business in 1860?

Ans. I was general clerk of Crawford, Cross & Co., at Cleveland.
143 Int. What was your business?

Ans. Dealers in bituminous coal.

Int. Do you recollect in 1860 of Edward Kelly coming to your office? And if so, for what purpose?

Ans. Some time in the summer of 1860, Kelly came to Cleveland on his way to Buffalo. I understood he called in the office, and I saw him, to endeavor to make arrangements for the supply of bituminous coal to be sold in this market by Kelly & Co.

Int. State what was said by Kelly in regard to his connections here. With whom he was connected.

(To which question the said defendant Hugh Maher, by his counsel, did then and there object, on the ground that the conversation between said Kelley and said plaintiffs was afterwards consummated by a written agreement, and that such written agreement was the best evidence; which objection of said defendants the said court then and there overruled; to which decision and ruling of the said court in overruling said objection the said defendant, by his counsel, did then and there duly except.)

Ans. As I was saying, Mr. Kelly, when in the office, talked about purchasing soft coal, bituminous coal, for a supply in their yard here to sell with the anthracite coal which he had under a contract with Cadwallader Bull, of Buffalo. Kelly, in urging the propriety of contracting with them for the coal, stated that he was not very well off himself; he was not respon-
144 sible for a very large amount.

(The said defendant Hugh Maher then and there object to said answer and renewed his objection to the further examination of said witness as to the said conversation of the said Kelly with the said plaintiffs at the time aforesaid, for the reasons aforesaid; which objection of the said defendant the said court then and there overruled, on the ground that the assumpsion of the defendants was not admitted to be true, and was not warranted in fact so far as yet appeared; to which ruling of the said court in overruling of said objection of said defendant the said defendants, by his counsel, did then and there duly except.)

Int. State to the jury what you know in regard to what Mr. Kelly said.

Ans. He stated that Mr. Maher was a man of means, and that anything that we sold to the concern the concern were perfectly good for, and, in addition to that, that the hard coal contract they had with Cadwallader Bull

was worth a good deal of money. After that conversation, it may have been a day or two days after, but my opinion is that it was afterwards, Mr. Cross and Mr. Kelly proceeded to my father's office and there an agreement was made selling them coal. In the mean time we enquired of parties acquainted with Mr. Kelly and Mr. Maher, and found the facts as stated by him
145 to be perfectly true.

Int. What was the name of this firm?

Ans. Kelly & Co.

Int. Do you know how much coal was sold during the year 1860 to Kelly & Co. by the firm of Crawford, Cross & Co.?

(Waived.)

Int. What time was this agreement entered into?

Ans. Some time in August.

Int. And it was under this contract that the coal was delivered to Kelly & Co.?

Ans. It was, sir.

Int. Do you know how much, from your recollection or otherwise?

Ans. I can state, sir, from my recollections nearly. At the time the coal was delivered I was general clerk and did all the out-door work, and a portion of the coal I weighed myself at different times, and I may have made out several shipping bills, although I will not be positive of that. There were about 4,000 tons sold to them, though it was not all delivered; nearly half of it was Briar Hill and the other was Chippewa. When I say it was not all delivered I mean in this way: Mr. Crawford before then had leased a dock in Chicago, and had afterwards given it up; on that dock there was some coal, about 180 tons, which they took and transferred to their dock.

Int. Who composed the firm of Crawford, Cross & Co.?

146 Ans. Lemuel Crawford, David W. Cross, and H. B. Payne.

Int. And Hugh Maher and Edward Kelly, the firm of Kelly & Co.?

Ans. So I have always understood, sir.

Int. Go on and state, if you recollect, when and at whose solicitation you came up here to Chicago.

Ans. Early in January, 1861, Mr. Cross came up here at the solicitation of Kelly & Co., and perfected, as I understood, some of the arrangements by which Crawford, Cross & Co. were to furnish a bookkeeper for Kelly & Co., and under that arrangement I came up here on or about the 13th or 14th of January, 1861. In the evening I left home, I think it was the 14th, but I will not be positive, it may have been the 13th I came here, and on the 15th I think it was, it might possibly have been the 14th or the 16th, I went to the office of Kelly & Co.

Int. Where was that?

Ans. On the north side of the river above Wells Street bridge, occupied now by A. B. Meeker as a coal yard. I went to the office and was there placed in possession.

Int. Who was there?

Ans. I could not say positively. My impression is that Mr. Cross and Mr. Kelly were there. I think I accompanied Mr. Cross to the yard, and we met Mr. Kelly at the office. I was there placed in possession of the coal and fixtures and the yard.

147 Int. Scales and carts, and everything?

Ans. Yes, sir; so I understood, with the understanding that it was as security to our claim, there being at that time lawsuits here against Kelly & Co. for not paying for coal they had bought from other parties, Cadwallader Bull, of Buffalo, and other parties, I believe. They thought they would be crippled and troubled, as I believe they had been up to that time for a few days with claims or legal process, to prevent them selling this

coal. I was to take charge of it as bookkeeper of Kelly & Co., and keep other parties off the coal by having possession of it, and all the fixtures of the concern.

Int. Were the books delivered to you?

Ans. Yes, sir; at the same time.

Int. How long after you had been put in possession of the coal and the fixtures connected with the yard and the books, was before you saw the defendant Maher?

Ans. I could not state. It was a very few days. I could not say whether it was one day or two days, or three days after, but it was a very short time after.

Int. State what conversation you had with Mr. Maher in that first interview, when he came down to see you after you took possession of the office on the 15th of January.

Ans. My recollection is that I was introduced to Mr. Maher by Mr. Kelly,
in the office. I think they were both there. I am very positive; I
148 might be mistaken, though I think not. After a few moments Mr.
Maher hoped that I would place the accounts in the way of collecting, and have good luck in selling the coal.

Int. At the time you took possession what was the amount of the indebtedness then due to Crawford, Cross & Co. for coal delivered to Kelly & Co.?

Ans. Somewhere between $6,000 and $8,000, I think.

Int. You cannot state any more definitely than that?

Ans. I could not; my impression is that it was in the neighborhood of $7,000, but I will not be positive of that.

Int. State what was your conversation with Mr. Maher when he came in.

Ans. I have stated it all.

Int. What did you do at his request in relation to his account?

Ans. For a few days I did not do anything with the books, as I was waiting to see Mr. Hunt to get some information in regard to the books. I then commenced making my entries for sale of coal, without ballancing the books at the time I took them. In the mean time I was laboring to bring the books to a ballance, which I, however, did not succeed in doing at that time. As soon as I could post myself with regard to the accounts and the customers
(being a perfect stranger here) through Mr. Kelly and Mr. Fleming,
149 who was then the weigh clerk, I went on to make out the accounts,
and I gave them to Mr. Kelly to collect. He was then the active man and did the selling of the coal mostly. The orders came through him, and he continued to do the business as he always had done.

Int. Was Mr. Maher aware of this fact?

Ans. He was, sir.

Int. How long was it after this first interview with Maher before you had a second interview, and what report did you make?

Ans. Mr. Maher was not an active partner, and came to the office only occasionally, perhaps once a week, or, perhaps, only once in ten days. Sometimes he would stop in the office and talk with me, and sometimes he would ask if Mr. Kelly was in, and not finding him he would jump into his buggy and drive away; sometimes he brought orders for coal, but generally he was on other business.

Int. What representation did you make to him?

Ans. Nothing impressed me in regard to his conversation, till some time in the month of March. The date I cannot recollect, but it was some time in the month of March, because I had made remittances to Cleveland. He came down and asked how we were doing. I told him the coal trade was very dull and collections were very slow. I do not remember anything further in regard to the conversation. He asked me for Mr. Kelly and then went out.

149½ Int. Did you state to him then any amount that was due to Crawford & Co., or did he ask you?

Ans. I think not.

Int. When did he ask you?

Ans. The next conversation I remember could not have been till some time in April. Mr. Maher came down to the office, and after asking where Mr. Kelly was he stood at the side of me as I was writing; I think I was drawing a bill, and he asked me what we had sent down. I told him, "Nothing for some little time." He said we did not seem to be pushing things much, or something to that effect. I explained the reason that a great many of the accounts or bills appeared to have been settled without so appearing on the books, and a great many more were under contracts for coal and would not pay till the end of the season.

Int. What do you mean by being under contract? Many of those accounts you say were under contract.

Ans. Yes, sir; here it is customary, I believe, to contract in the fall for coal, to deliver all through the winter at a certain price.

Int. And that is what you mean in those instances?

Ans. Yes, sir. Contracts were made in the summer as early as August, I believe, for delivering coal through the winter at certain prices; these contracts had been made at ruinously low figures.

150 Int. What did Maher say about Kelly making contracts at ruinously low figures?

Ans. Nothing at the time.

Int. Did he after?

Ans. I think he did at one time.

Int. Well, just go on and tell in your own way.

Ans. That we failed to make collections for these reasons: I did not know any of the parties, and Mr. Kelly took most of the bills; that there was very little sale of coal outside of the contracts, because the manufactories and those customers that used large amounts had contracts running.

Int. Do you say that you told him these contracts were payable at the end of the season?

Ans. No, sir; I did not tell him that.

Int. I believe when the court adjourned we were on the conversation you had in April, 1861, with Mr. Maher. I wish you to state what that conversation was between you and Maher.

Ans. Mr. Maher asked when I had remitted money below. I said, "Not for some time," and gave him the reason for not having done so.

Int. What were the reasons?

The court. He repeated them before the recess.

Int. Now, then, what did Maher say in reply to that? What other course did he direct you to pursue?

Ans. He directed me to hasten the collections as much as possible.

Int. For what purpose?

151 Ans. I do not think he mentioned any purpose.

Int. Did he say anything about his liability with Crawford, Cross & Co. on that occasion?

Ans. I think not, sir.

Int. Then what was the next conversation you had with him, and about what time.

Ans. Mr. Maher came in several times, but there is nothing that impresses it on my mind with reference to what was said. I knew he desired to see Mr. Kelly, and once I know he asked me if I knew where Mr. Kelly was, after telling him he was not there, and I told him I did not. When he did meet Mr. Kelly what conversation they had was chiefly out of doors, so

that I heard very little that was said between them. I do not think that I ever heard any conversation at all; they were not in the habit of meeting in the office.

Int. Were they not on friendly terms.

Ans. Well, I do not know. Mr. Kelly did not seem particularly anxious to see Mr. Maher, at least I never heard him say so, but at times he would step out of doors.

Int. Up to the time of the conversation in April what was the temper of Maher in regard to the accounts? How did he feel with regard to the liability that he was under to Crawford, Cross & Co.? How did he express himself? (Objected to.)

The court. State what was said and done.

152 Ans. It was some time afterwards—I think it was as late as the latter part of June; it might have been after the 1st of July; I do not remember the exact time; it was, however, quite late, only a short time before I went home—Mr. Maher came to me in the office and asked me about the accounts. On my telling him of the poor success in collecting them, he expressed the feeling that I should take them and collect them. I told him I did not know the parties, and that Mr. Kelly desired to collect them, and that I had given a great many to Fleming, and that he had poor luck with them. He then steped out of the office. I followed him out, and the conversation I had with him was near the place where the horses were hitched, near the end of the office. Mr. Maher told me that "he hoped we would manage to get things closed up as soon as we could; that the business had been a very unfortunate one for him; that he had lost very largely; that he had lost two years' rent for the dock; that he had a lawsuit with Cadwallader Bull, of Buffalo; that *that* he had trouble with Scott & Kankin, of Erie, and that a large number of people had claims against him, for *Kelly was not good for anything*, and the 'Lord only knows,' or 'God only knows'—the 'Lord' I think was the word—'how many other people have got claims against him." I told

153 him that there was a poor prospect of getting much out of the books. He told me he wished we could get on with it as soon as we could, because, in addition to other losses, it looked as though he would have to pay Crawford, Cross & Co. something. He then said that Kelly had managed the business miserably; it seemed as if he was determined to ruin him.

By Mr. Munroe:

Int. You stated then that he thought he should have to pay Crawford, Cross & Co. this debt?

Ans. Not the debt, but something.

Int. That is the language he used?

Ans. I think that is the language, to the best of my recollection and judgment.

Int. He then said that Kelly had managed the business miserably, and it seemed as if he was determined to ruin him.

Ans. Was or had been, I do not remember which; I think it was "was."

By Mr. Cary:

Int. State to the jury whether in any of these conversations anything was said by Maher in regard to fulfilling these contracts which Kelly had made.

Ans. Yes, sir; I think there was.

Int. State what it was.

Ans. I think that in my judgment would be in April, it may have been in May, but I think it was in April, in speaking of the contract, that

154 is of our having to fill them, of the coal going to fill these old contracts with parties in town. In speaking of the failing to collect some of these accounts, in consequence of the men refusing to pay till the coal-burning

season was over, Mr. Maher said, of course, these contracts will have to be filled, or something to that effect. I would not be certain that that was the exact language, but that was the impression I have of it.

Int. You delivered coal on account of these contracts, without any objection on the part of Maher.

Ans. Yes, sir.

Int. Did you buy any other coal by direction of Mr. Maher, for the purpose of filling these contracts on hand?

Ans. Not by Mr. Maher's direction. I do not know when we got out of hard coal; it was some time in the spring or summer we got out of hard coal. Mr. Kelly purchased some hard coal in the city, and afterwards we purchased some of Meeker, most of which we delivered on contracts. We sold very little of it; we may have sold some of it, but it was most of it used on old contracts.

Int. Was Maher aware of this fact?

Ans. I do not know; some time before I came home, the latter part of my stay at the office, Mr. Maher told me yes. I am pretty positive Mr.
155 Maher told me he had dissolved with Kelly, and he would not be responsible for any coal that was bought by Kelly after that.

Int. When was that?

Ans. I could not tell; it was late in the spring; perhaps in June.

Int. Late in June?

Ans. I could not tell the exact date; it was late in the spring.

Int. He told you that the partnership had been dissolved and he would not be responsible for any coal purchased by Kelly after that?

Ans. Yes, sir. I do not remember whether it was in the office or not.

Int. Was he there after that looking after Kelly and coal?

Ans. Yes, sir. The last conversation I had with him was after the time that he told me of the dissolution.

Int. Now, Mr. Payne, will you state what became of all this coal that was supplied under this contract to Kelly & Co.?

Ans. Well, sir, the coal commenced arriving in the summer of 1860 and along in the fall. One cargo did not arrive till later, in the spring of 1861. It froze in on the way. A small cargo of 180 tons, I think. The coal was received by them and sold by the two individuals on contracts with the U. S. and other parties. After I came here the coal that was on hand
156 was retailed out, a great deal to the mills. When I first came here the mills were lying idle, so that a great deal of the coal that was sold when I first came here was eat up by the expenses of the yard.

Int. What time did you return home?

Ans. In the latter part of July.

Int. How much coal was on hand then?

Ans. I could not tell; there was not a great deal.

Int. What did it consist of?

Ans. There was a portion of that last cargo that came up, a little Chippewa.

Int. So that it was all sold out?

Ans. Nearly; I do not recollect how much there was left.

Int. With whom did you leave the coal yard and fixtures and the coal on hand when you returned home?

Ans. In reference to my return home in the spring of 1861, the coal firm of Crawford, Cross & Co. was dissolved, and my father made arrangements for me to become a partner in a new house. We had opened business in Cleveland and done business before I knew of it. I protested against it, as I wanted to go into the army, but my father said he had a large amount of money which he had lost in these coal lands, and he thought by my going into this concern I might perhaps recover a portion of it. They were very

anxious to have me go home. Very few of the accounts here were collectable, and a great many of those that were so were parties who paid
157 in a month. They were considered cash sales, but they were really on short time. Mr. Cross came down here for me, requesting me to go up home, and I left him here in the office.

Int. Who was there when you left?

Ans. Mr. Kelly and Mr. Cross.

Int. Who else was there?

Ans. Mr. Flemming was there, and continued some time.

Int. How long after you ret. home was it before Cross ret. home?

Ans. A few days; I could not tell how long. He was detained here a few days selling coal and on our business.

Int. Just before you left, did you state to Maher or to Kelly the amount due to Crawford, Cross & Co.?

Ans. No, sir; I do not think I did. I think, however, they knew about the amount, both of them. Mr. Kelly certainly did, and Mr. Maher knew what I had sent off and could judge about the amount remaining due. I can state positively that I did not state it to them, but I have every reason to believe that they both knew about the amount.

Int. Was there any of the coal or fixtures or property connected with the yard turned over to you a second time?

Ans. No, sir; there was not.

Int. Was there any scales, or anything of that kind, turned over to you?

Ans. Not that I remember.

Int. You rec. the whole at one time?

158 Ans. All I recollect is the first time.

Int. You never heard of any transfer after?

Ans. Not while I was here.

Int. When you left the city, on the 24th of July or thereabouts, who did you meet at the depot on leaving?

Ans. Mr. Maher got on the train about the time the train got started.

Int. What conversation did you have with him in regard to his liabilities?

Ans. We did not talk a great deal about the coal business. He was surprised to see me there and expressed his disappointment at my leaving before it was closed up. He said I ought to have stayed till it was closed up. I told him of the fact that I had started business in Cleveland and that it was necessary for me to go there, and that there was very little coal to sell and very few accounts to collect, and that I did not wish to be of expense to them, and I was going home. I told him I had left Mr. Cross there.

(Book placed before witness.)

Int. Look at these books and say if they are the books of Kelly & Co.

Ans. They are.

Int. Have you examined them?

Ans. Very little. I saw them on the table this morning.

Int. Will you turn to the ballance sheet made out by Mr. Quigg?

159 Ans. Do you mean the final statement? I think that is in the journal, sir.

Int. Just examine the coal account and see *and see* how much was delivered, how much has been delivered, how much has been paid for, and what is the ballance that is due to Crawford, Cross & Co.

Ans. I do not know that I can tell from the coal acc't. I can tell from Crawford, Cross & Co. acc't. At what time do you mean?

Int. Well, on the 16th of June.

Ans. It is footed by Mr. Quigg. The balance is $5,474 34.

Int. Have you any means of knowing whether that is correct from an examination you have made of the books?

Ans. I examined them very casually. It seems to me that it is. There is one matter which is not brought in, and that is discount and insurance. That is discounts on exchange and the amounts paid for insurance.

Int. That ought to be added?

Ans. I think the exchange should be. It is customary to sell the coal in Cleveland, and the payment should be made there.

Int. That is the amount that is due to Crawford, Cross & Co. from your examination of the books?

Ans. I presume so. Coal sold higher in the spring, and it was not intended they should net more than the price paid for them, and Crawford, Cross & Co. were to have half of the profits. That share of profits, $1,040 07, is added here.

Int. This was added to the account of Crawford, Cross & Co.?

Ans. Yes, sir.

160 Int. And it increased the amount of their ac?

Ans. It increased the amount of their credit.

Int. And of Mr. Quigg's ballance?

Ans. Yes, sir; it increased the ballance.

Int. And from your knowledge of the books and the sales and business, you state that as a fact, that that is about the amount that is due?

Ans. I should say so. My impression is that when I left the ballance was about $4,500, as nearly as I recollect, perhaps about $4,000, without the addition of this profit.

And on his cross-examination said witness testified as follows, to wit:

Int. What time was the firm of Crawford, Cross & Co. dissolved?

Ans. My impression is April, 1861. I think that was the end of their year; though I am not positive.

Int. Did you become a partner in the coal business at that time?

Ans. I did, sir, after April. I think so at least, but I won't be positive of the day, but it was some time in the spring—not the firm of Crawford, Cross & Co.

Int. Did they have to do with the coal business after that time?

Ans. They did not; we never had in the spring.

Int. Did not the entire business of Crawford, Cross & Co. pass into the new firm of which you were a partner?

Ans. No, sir; it did not.

161 Int. What became of Crawford?

Ans. He became a member of the firm of Lemuel Crawford & Son.

Int. What do they do?

Ans. They are coal dealers. I may state here that Lemuel Crawford is the oldest coal dealer in Cleveland.

Int. Who took this coal in Chicago?

Ans. It belongs to the firm yet, till they get pay for it. Owing to this matter of Kelly & Co., and to the condition of the Ill. C'y in the spring of 1861 and in the winter, Crawford, Cross & Co. did not make a very large amount that year.

Int. Was you not directed by them not to forward the amount collected on ac. of the state of the currency?

Ans. I was not. When we had any I deposited it and sent a certificate of deposit to them, which they had, and it was transferred to their own bank afterwards, although there was quite a ballance due them at Tinkham's, which they settled for at 30 or 40 cents and took whiskey for it afterwards. They have got the whiskey yet, I believe.

Int. Is it not a fact that Mr. Maher was gone away after the first of May for some 2 or 3 months?

Ans. He did not.

Int. Was he here?

Ans. He was not all the time, but he was a portion of the time.

Int. How long was he gone?

Ans. I could not tell. He was contracting with the government, and was back and forth buying cattle, &c.

162 Int. You did not see him frequently?

Ans. I did not see him frequently any way.

Re-ex. by Mr. Cary.

And on his redirect examination said witness testified as follows, to wit:

Int. Coal delivered in this contract, was it shipped at the prices mentioned in this contract?

Ans. It was charged at those prices.

Int. Did you take possession on the 15th of January, after this supplementary agreement of Jan. 10th?

Ans. I read the agreement, and I supposed I took it under that agreement as security, but as much as anything else to protect the sale of the coal from these creditors of Kelly & Co. that were after them. The coal began to be worth a good deal more money than it was in the fall of 1861. The understanding was that they were not to net more than these prices, and we expected half the profits in selling them. There is one other matter I might have spoken of, and that is that card, (showing one.)

Int. Tell what you know of that card. Read what is upon it.

Ans. "No orders taken for coal at this office, unless paid for here or on delivery. The book-keeper will be held responsible for the observance of this rule." Signed Kelly & Co. Mr. Kelly spoke to me of that card, and called my attention to it. It is customary with us to have such a

163 card as that in our office in order to prevent friends that they may have from asking credit. The card was printed before I came to Chicago, and lay around the office; it may have been on the wall. There was two in the office. I understood that they expected that I should be responsible for the coal I sold. Mr. Hunt only had $400 a year, and I did not think he could be at that low price. The coal was sold by Mr. Maher and Mr. Kelly almost entirely; occasionally a person would come to the office to buy some coal, but there was no coal of any amount sold in that way.

Int. Did you understand that you were expected to pay for the coal sold in that way?

Ans. I certainly did not expect it.

Int. You heard nothing of that?

Ans. No, sir, I did not, and only since then I have heard that I was expected to be responsible for all the coal sold while I was here.

Int. You say that was in the office when you got there?

Ans. Yes, sir.

By the court:

Int. It is equivalent to no credit?

Ans. That is what I supposed it was.

By Mr. Nicholes:

Int. Are you certain that that card was put up?

Ans. I am certain that it was. I found it on the safe.

Int. It was in the office, then?

164 Ans. There was one up in the office.

Int. Why did you say it was there when Mr. Hunt was there?

Ans. Mr. Hunt told me so.

Int. You do not know it was?

Ans. Of course I did not; I was not in the city.

The witness, after leaving the stand, desired to give an explanation as to bookkeeping, which he was permitted to do as follows:

I simply want to say that when I took possession the books were behind,, and the acc't in bad shape, and I could not get them in the way to close them without making more trouble than I desired to do, and I did not leave them in as good condition as a first-class bookkeeper would have kept them in. I can keep an ordinary set of books; I have done several times, and I kept these as I should have done at home; I erred probably in that line.

The pl'ffs then rested their case.

Whereupon the said def't Hugh Maher, to maintain the issue on his part, called as a witness James Flemming, who, being sworn, testified as follows, to wit:

Int. Were you employed in the yard of Kelly & Co. at the time Mr. Payne came?

Ans. Yes, sir.

Int. Do you know anything in relation to this notice—this card?

Ans. It lay on the *the* table the day Mr. Payne came, as well as I
165 recollect; he took and looked at it and read it.

Int. Was that the first time you had seen it?

Ans. It was there a day or two before that; I think it was put up on the wall a day or two after.

Int. What was said to be the object of putting it up?

Ans. The object is what it says, I suppose; to deliver no coal without the money was collected, or the bookkeeper to be held responsible.

Int. Was that talked over at the time?

Ans. Yes, sir, he read it, and Mr. Kelly was in the office at the time, and he made some remark that it was strict, or something of the kind.

Int. At what time did the partnership between Maher & Kelly cease?

(Objected to. Objection overruled.)

Ans. From what I have heard Mr. Maher say in the office, the 1st of May, 1861.

Int. What did you hear Mr. Maher state to Mr. Payne?

Ans. He asked him if Mr. Kelly had told him of the dissolution of partnership.

Int. You may state then, if you know anything about that?

Ans. I heard Mr. Maher enquire if Mr. Kelly had published a notice, which he had left in the office for him, in one of the papers, the Times or the Post, and Mr. Payne said he did not know. So far as I recollect, Mr. Maher said if it had not been done up to that time, to have it done immediately.

Int. When was this?

166 Ans. It was about the 1st of May. Mr. Maher left the notice, as I then understood, about the latter end of April; he went away from home afterwards, and when he came home he enquired if the notice had been published, and if not to have it done right off. He left a written notice to have it published.

Int. When did you see Mr. Cross here first?

Ans. Well, I think I saw him in the summer of 1860.

Int. After Mr. Payne came when did you first see him?

Ans. He was there about the time Mr. Payne came, as well as I can recollect, and he was then not a great while after that. He was there two or three times during the summer.

Int. When did you see him last?

Ans. About the 1st Sept., 1861, I think.

Int. State whether you heard any conversation between Mr. Maher and Mr. Cross in Sept.

Ans. I heard Mr. Maher say to Mr. Cross that they gave up the outstanding bills and debts that was due and was to be collected for the coal delivered, and whatever coal there was and such things, in payment for what they owed him; everything that there was in the yard that belonged to them.

Int. What other consideration was there at that same time?

Ans. Well, if I recollect——

Int. Was there anything said at that time in relation to the dissolution of the partnership?

Ans. Mr. Maher remarked that Kelly and himself had dissolved partnership a long time ago, and that he was not responsible for anything
167 that he did afterwards.

Int. Where did this take place?

Ans. In Mr. Kelly's office, in the coal yard.

Int. Did Mr. Cross at that time dispute these things were turned out in satisfaction of their debt?

Ans. I do not think he did dispute it. I think he admitted that it was.

Int. What did he say? Did he say anything that you recollect?

Ans. He admitted that it was given to him, but that it would not pay it. I guess at the time.

Int. That the debt was not paid by it?

Ans. Yes, sir, something like that.

Int. You say this took place where?

Ans. I think it was in Mr. Kelly's office.

Int. What time was it?

Ans. Some time about the fore part of Sept.

Int. Who was there, if anybody, at the time?

Ans. I do not know there was anybody there in the morning but Mr. Cross, Mr. Maher, and I.

Int. Did you ever see the articles between Mr. Maher and Mr. Kelly?

Ans. I do not know that I have, sir.

Cross-ex. by Mr. Munroe.

And on his cross-examination said witness testified as follows:

Int. When was this?

Ans. It was in the fore part of Sept., 1861.

Int. What time of the day was it?

168 Ans. It was in the morning.

Int. Was it after Mr. Payne got there?

Ans. After; Mr Payne was gone away at the time.

But where was Mr. Kelly?

Ans. I do not know, sir, where he was.

Int. Was he about there?

Ans. He was not in the yard at that time. I was not in their employ at that time. I had left a few days before, but I was in the office on the morning.

Int. Who commenced this conversation?

Ans. I could not say which of them commenced it. They saluted each other when they came in. They spoke to each other and talked over the matter. I could not say which commenced.

Int. Did they come in together?

Ans. No, sir.

Int. Who was there first?

Ans. I think Mr. Cross was there first.

Int. Mr. Maher came in after?

Ans. Yes, sir.

Int. Just give the whole of the conversation.

Ans. I could not distinctly repeat every word, but it amounted to what I said before.

Int. What was that?

Ans. That they had given up the money for the coals that had been delivered, and the other traps around the yard in payment for the money owing.

Int. Did not the conversation arise with regard to the amount of
169 money that had been received for the coal? Was there anything said about that?

Ans. No, sir; I do not recollect anything being said about the amount they had rec.

Int. Did Mr. Maher or Mr. Cross commence it?

Ans. I think it was Mr. Cross spoke first.

Int. How did he commence? What did he say?

Ans. They spoke to each other and asked how they were, something like that; and they spoke about some money, and Mr. Maher said they had given that in payment.

Int. Who spoke about money?

Ans. Mr. Cross talked about settling up for the coals.

Int. He wanted more money to settle up and pay for this coal, did he?

Ans. I do not know that he did.

Int. What was said?

Ans. I do not know as he did want him to pay some money or not.

Int. What did Mr. Cross claim that gave rise to this answer?

Ans. They talked about the settlement of the coal.

Int. Did Mr. Cross want him to settle.

Ans. I guess so, and Mr. Maher said they had given them that, and he admitted it.

Int. Mr. Cross then asked Mr. Maher to settle with him and pay him for the coal?

Ans. I do not know that he did ask him, sir.

Int. What did he say?

Ans. They looked over matters, and I heard Mr. Maher say they
170 had given them this for what they owed them.

Int. What did Mr. Cross say? You said that he wanted to settle.

Ans. I do not know whether he wanted him to settle or not.

Int. When was your attention called to that conversation?

Ans. This morning, sir.

Int. How often has it been called to that conversation since you heard it?

Ans. I do not know it has been any time since the day I heard it.

Int. Has nobody said anything to you about it?

Ans. No.

Int. Not at all?

Ans. No; I remarked it at that time, and I recollect of it.

Int. Have you not talked with anybody to day about this conversation?

Ans. No, sir; not that I recollect.

Int. When did you name it to anybody?

Ans. I do not know that I did at any time.

Int. Was you subpœnaed here by an officer?

Ans. No, sir; I was not.

Int. Who told you to come here and testify?

Ans. Mr. Maher told me.

Int. Did he ask you what you were going to testify to?

Ans. Not anything of this.

Int. Did he ask you if you remembered this conversation?

171 Ans. He asked me some time ago, I guess.

But I thought you said you had not talked with anybody since the day it occurred.

Ans. He told me to remember it at the day it occurred, and since that day I do not think he has?

Int. Did he ask you to-day if you remembered it?

Ans. No, sir.

Int. Did you ever have any such conversation with anybody else, about your knowledge in regard to that transaction?

Ans. I do not recollect that I had.

Int. Do you remember having any conversation about a month ago with this gentleman here? (Pointing to Mr. Casey.)

Ans. Well, I remember him coming up to my place there; I think it is this gentlemen; I would not say for certain.

Int. Did he ask you if you knew anything about this transaction?

Ans. He did not ask me about this transaction. He asked me if I knew about the affair of Mr. Cross and Mr. Maher, and what Mr. Maher said.

Int. What did you tell him?

Ans. I told him I did not.

Int. You had forgotten all about it then?

Ans. I told him I did not know of anything that would be of any use to him, and I did not want to come.

172 Int. Who asked you to come?

Ans. Mr. Nicholes and Mr. Maher.

Int. Was anybody else there?

Ans. No, sir.

Int. Who talked with you about what you were going to say?

Ans. None of them.

Int. They did not ask you about what was said between Mr. Maher and Mr. Cross?

Ans. Mr. Nicholes asked some time ago.

Int. What did you tell him?

Ans. I forget now.

Int. Was it before the 12th of March?

Ans. I could not say.

Int. Was it before the 12th of Feb.?

Ans. I could not say when it was.

Int. Was it within a week?

Ans. It was not.

Int. Did he tell you what they wanted you to testify about?

Ans. No, sir; he did not.

Int. Did Mr. Cary when he saw you ask you whether you had ever heard any conversation between Mr. Cross and Mr. Maher?

Ans. I do not know.

Int. Do not you know whether he did or not?

Ans. I do not recollect whether he did or not.

Int. Did he not ask you that question? You remember him meet-

173 ing you, do you, do you not?

Ans. I remember him meeting me.

Int. Do you remember him asking you that question?

Ans. He asked me if I ever heard Mr. Maher say anything about paying money to Mr. Cross.

Int. Did he not ask you whether you had ever heard any conversation between Mr. Maher and Mr. Cross?

Ans. I do not recollect them asking that question. He asked me if I ever heard Mr. Maher say that he should pay any money to Mr. Cross.

Int. Did you not say that you knew nothing about it whatever?
Ans. I do not recollect that I did. I told him that I did not know anything about paying money to Mr. Cross.

By the court:

Int. What were you doing at the time this conversation took place?
Ans. I was going round to the office. I expected to go to work in a building that was close by there. It was converted into a granary.
Int. Were you sitting down or standing?
Ans. I was standing by the desk in the office.
Int. Not doing anything?
Ans. No, sir.
Ans. Was you listening to the conversation?
Ans. I was part of the time. I came out of the office, I believe, be-
174 for they did.

(And the said defendants, further to maintain the issue on their part, produced as a witness Geo. H. Ford, who, being duly sworn, testified as follows:

Int. Were you partner of W. W. Drummond at the time this contract was drawn?
Witness. What contract?
Counsel. Have you heard the testimony in this case?
Ans. I heard a portion of it, but I did not hear the contract.

By the court:

Int. When were you in partnership with Drummond?
Ans. From the 1st of Mar., 1861, to April 1st, 1862.

By Mr. Nicholes:

Int. Do you know in whose handwriting that is? (Contract handed to witness.)
Ans. I should think that the forepart is mine. I have given a deposition in this case before, but I did not then know that I had anything to do with the drawing of this contract.
Int. What contract is that?
Ans. The last contract, I suppose.
Int. Who was present when it was executed? Were you?
Ans. Well, sir, I do not know whether I was or not. I went out, and
175 somebody else finished it. I should think that that is Mr. Dummond's writing. I was not aware till now that I had anything to do with writing it. That first page is in my handwriting, however.
Int. Who was present at the time that contract was drawn?
Ans. Well, sir, there was an agreement that was entered into or talked of being in substance like this, between Mr. Cross and Mr. Kelly, Mr. Drummond and myself. I was present myself all the time before I went out.
Int. Was Mr. Maher there?
Ans. He was there in the forepart of the interview. He left before the contract was consumated between Mr. Cross and Mr. Kelly.
Int. Was there any conversation at that time between Mr. Maher and Mr. Cross?
Ans. Yes, sir; some little conversation.
Int. What was that conversation?
Ans. Mr. Maher, Mr. Cross, and Mr. Kelly met at the office. I was at that time unacquainted with Mr. Cross, and was introduced to him. I had some acquaintance with Mr. Maher and Mr. Kelly; and there was some conversation in regard to the settling up of some coal account.
Int. State what they said.

Ans. It seemed to be an agreement between them and my partner that they should meet there.

Int. That is, all these parties?

Ans. Certainly, sir, Mr. Cross, Mr. Kelly, and Mr. Maher; and Mr. Maher claimed that he had nothing to do with any settlements; that he and
176 Kelly had dissolved partnership in the spring previous, and that he had already made a contract with Mr. Cross turning out the fixtures, book ac., &c. I do not know what other things they mentioned, but other things were mentioned in connection with the coal yard that I do not know the use of nor understand. They mentioned once a lot of things. Mr. Cross's first reply was that he had taken them as collateral and that he wanted a guarantee from Mr. Maher. Mr. Maher then claimed that the agreement was that he should be released on turning these out. Mr. Maher said that it was the understanding that they were to be released, by a subsequent contract that he was to be released. There was some conversation between Mr. Maher and Mr. Cross in regard to how the books had been managed. I knew Mr. Payne, but I did not know that he had anything to do with the business. Mr. Maher thought he ought to be released. Mr. Cross thought they ought to be paid anyhow, and Mr. Maher left the room indignant, stating that he had no proposition to make, and would not do anything. Afterwards a contract was drawn up, of which I believe that to be a copy, and signed, by Kelly, "Kelly & Co.," and the question came up as to whether Mr. Kelly had a right to sign it.

Int. What did they say?

177 Ans. Why, they talked it over, and there was a good said. I could not remember all. I know Mr. Drummond's advice at that time, and Mr. Cross's opinion. Mr. Cross thought he had a right to sign it, because it related to the business that grew out of the partnership, and Mr. Kelly finally did sign it.

Int. Was Mr. Cross a lawyer at the time?

Ans. That I cannot say.

Int. Was there anything said at that time in regard to keeping this contract secret from Mr. Maher?

Ans. Mr. Kelly said that Mr. Maher would be very indignant with him, and did not know whether he would agree that he had a right to sign it, but after they had discussed it, it was signed with the injunction that it should be kept from Mr. Maher, and I was requested not to name it and I did not name it until now. They said it was enough to pay the indebtedness of the old firm, and they would not say anything to Mr. Maher about it, because he was indignant.

Int. When Mr. Maher said he had turned out the coal and other property in satisfaction of the claims against him, what reply did Mr. Cross make?

Ans. After he said he was released from the indebtedness by turning out the property, Mr. Cross made no reply whatever. Mr. Maher left the room after repeating that two or three times. He was quite indignant and left the room.

Int. Were these accounts left with you?

178 Ans. They were left in our office, and Mr. Drummond had correspondence with Mr. Cross in his own name, and had charge of the collections, except a few accounts, which I have stated in my deposition.

Int. When did Mr. Quigg look over the books?

Ans. He had the books in our office most of the time.

Int. Were the books left there immediately after?

Ans. I do not know. I suppose they were, for a short time afterwards it was he came into our office and had charge of a set of books there. I had nothing to do with them except the two instances I have named.

Said witness, on his further cross-ex., testified as follows:

Int. You say that Mr. Cross, when Mr. Maher told him that he was released by virtue of turning over this property, made no reply. I want to know if Mr. Cross did not distinctly say that he had taken this property as collateral security for his demand.

Ans. That remark was made when the conversation first come on.

By Mr. Munroe:

Int. What was the condidition in which you found the books?

Ans. I had but little to do with them. The only aceounts I ever collected was one of $10 and one of $5, which I collected at one time. Mr.
179 Quigg and myself were together, I think, at the time.

Int. You did not collect $400 or $500, did you?

Ans. No, sir; I guess not; $15, I said. There must have been collected for the pl'ffs or some one else considerable money; what amount I do not know.

Int. Did you find lots of contra claims against these ac., and a great many of them that had been presented and paid previously?

Ans. I never collected any, sir, where there was any set-off, except what had been paid to my partner, but I heard a talk that Mr. Kelly had collected some. I called on one or two and they said they had paid Mr. Drummond.

Int. He had charge of this?

Ans. Yes, sir.

By Mr. Nicholes:

Int. How much money had been collected by Mr. Drummund?

Ans. The books will show $1,000 or $1,100, and I thought from other sources that I heard afterwards that he had collected about $2,000, that is my opinion.

Int. And the books, you think, show about $1,000 or $1,100?

Ans. I think so.

Int. And you thought he collected about $2,000?

Ans. It is only guesswork, except what Mr. Quigg showed upon the books.

Int. For whom did you consider you were acting?

180 Ans. In a conversation with Mr. Cross, after leaving the books, I suppose we were acting as his attorneys.

Int. What did he say?

Ans. He said he wanted us to go on and collect the money, to remit it as fast as we could, after he got home, and from these letters that I did see, I supposed we were acting as the attorneys of Crawford, Cross & Co. in collecting the money. They corroberated the statement he made to me in regard to collection and urging on the claims.

And the said def't, further to maintain the issue on his part, then produced Benjamin Holbrook, who, being duly sworn, deposed as follows:

Int. I have an agreement here between Crawford, Cross & Co., of Cleveland, and Kelly & Co., of Chicago, in which they agree to furnish Kelly & Co. with coal for that season, to be sold on commission. What is your trade?

Ans. I am a coal dealer—and wood.

Int. What would be your understanding in regard to the termination of that contract?

(Objected to.)

The court. You may ask the question, although I do not see the use of it.

Ins. What would be the meaning of the term as used in the market here?

Ans. I do not hardly know what the arrangment was.

181 Ins. In such an agreement as this, how far would the season extend?

Witness. Do I understand that Crawford, Cross & Co. have undertaken to supply them with all the coal that they could sell during the season?

Counsel. Yes, sir.

Ans. I should expect that they would supply them with the coal; they could sell to the first of next May or the opening of navigation—about the 1st of May.

And the said def't, further to maintain the issue on their part, then produced Thos. B. King, who, being duly sworn, deposed as follows:

Int. What is your business?

Ans. I am engaged in the flour business at the present time, on commission.

Int. Are you a bookkeeper at the present time, and accustomed to keep books?

Ans. I have been accustomed to keep books more or less for about 30 years, at different times.

Int. You can state, if you have looked over the books of Kelly & Co., here in evidence in this case?

Ans. I have examined them to some extent.

Int. How long a time, in your opinion, would be required for a bookkeeper to determine the state of the ac. of Crawford, Cross & Co., from those books?

(Objected to. Objection sustained.)

182 Int. Have you examined the ballance sheet as shown in the ledger?

Ans. Yes, sir.

Int. Does that exhibit the ballance of ac. as shown in the books at the present time?

(Objected to. Objection overruled.)

[Balance on page 104 of ledger shown.]

Ans. The ballance ac. is erroneous from the fact that some of the ballances have been paid and so adjusted on the journal and not accounted for in the ballance ac. There is one item of $6 75. There are accounts that I have marked as being collected and not so put in the ballance ac.

Int. Do you know any of the parties?

Ans. Some of them I know.

Int. Are they responsible?

(Objected to.)

Int. Have you examined the day-book?

Ans. I did.

Int. In what book is the original entry made in this set of books?

Ans. The original entries are made from the sales-books in the day-book.

Int. How many pages of the original entries are there there?

Ans. I took them down and I believe there are six original entries in handwriting of Mr Quigg,

183 Int. How many are there in the journal?

Ans. I believe forty of original entries and corrections; about eight of original entries.

Int. Exclusively original entries?

Ans. Yes, sir.

Int. Turn to Mr. Quigg ac. in the ledger?

Ans. Page 78.

Int. What is the first credit he gives himself?

Ans. $25.

Int. Was that properly entered?

Ans. That is an error; it is a counter charge; he shows it to be so afterwards.

Int. What is the next?
Ans. $6; that is an error; he first charges it to himself and then credits it.
Int. It does not seem to go to any one, does it?
Ans. As it now stands it does not.
Int. What is the next?
Ans. Kelly & Co., $137 11 on ac. of some old books.
Int. From the books, where does it come from?
Ans. It does not come from anywhere in their books; it should be charged to expense ac.
Int. Does it come from that book at all?
Ans. It comes from an old set of books.
Int. What is the next charge?
Ans. The next is sundries, $628 24.
Int. In regard to this $137 11, does it appear anywhere in the day-books?
184 Ans. No, sir, it does not.
Int. How much is the amount he has credited himself with as having received from the old firm?
Ans. I do not remember.
Int. Day-book, p. 347?
Ans. It is somewhat inaccurate there; he has charged it here $271 76; it seems something like taking Crawford, Cross & Co. money to pay old accounts.
Int. What is the next item on the ledger?
Ans. $628 24; that is for services writing up books.
Int. And one half of this is debited to Crawford, Cross & Co.?
Ans. Yes, sir.
Int. That property would not belong to the books at all?
Ans. Yes, I supposed it would be charged to them.
Int. If it was to work for them, would it be charged to them in these books?
Ans. If it was to diminish their account, it would; if it was not, it would not.
Int. Does it either increase or diminish it then?
Ans. As it stands here, it is against the effects of the coal sales.
Int. What is the next item?
Ans. $9 60, on expense ac.
Int. Do the books show what it was?
Ans. It is petty items of cash paid from to time.
Int. But he does not say what?
Ans. No, sir.
Int. You can turn now to the ballance ac. and see if you find Quigg's name there.
185 Ans. No; I believe I do not.
(On looking, it was found by witness.)
Int. What do you find opposite his name?
Ans. There is nothing at the present time.
Int. An erasure.
Ans. There has been one; it is cut through the paper; I cannot tell what it was.

And the said witness on his cross-ex. testified as follows, to wit:
Int. It would not follow that Mr. Quigg was a dishonest man, would it?
Ans. Not that I know of.
Int. In these items there is $137 11 credited to Mr. Quigg that you say is for services in writing up the old books of Kelly & Co.?

Ans. Yes, sir; so stated in the journal.

Int. And there is also in the journal some $800 charged for writing up the present books of Kelly & Co.?

Ans. Yes, sir; $600 and some odd dollars.

Int. And there is also a credit of some $900 of money rec. from the collection of these accounts of Kelly & Co., so that in fact Kelly & Co. rec. credit for $137 11 of this money which was turned over to Crawford, Cross & Co. to pay for the settlement of their accounts?

Ans. He has credited himself with $137 11 for old services, not pertaining to these books.

186 Int. And taken it out of this money which was collected by him after he commenced to write up the books?

Ans. Except bills rec.; he takes a bill receivable for $340 and some dollars, and it seems afterwards that he is paid the money on that from Crawford, Cross & Co.

Int. Then this $600 00 was the am't for services rendered in writing up these books?

Ans. It seems so.

Int. Turn to the books and see what money he has charged himself with, and where it came from.

Ans. He has charged himself with various items amounting to $805, less $315, such as Cook & McLean, $ coals, $, Drummond & Ford $35, and so on.

Int. He has taken this $137 11 out of the funds rec. since he commenced writing up the books?

Ans. He rec. some personal property amounting to $70, but what that is I do not know.

Int. It was after he commenced writing up these books?

Ans. I should judge so.

Int. Do you mean to be understood as saying that these items that you have checked off are incorrect, and that they have not been accounted for or fixed up?

Ans. No, sir; all I was called upon to say was how these accounts stood; I took the ballance ac. and found it did not agree with the journal and the day-book; but it seems after the ballance ac. was drawn off, some of these ac. were paid, so that the ballance ac. is not accurate.

187 Int. It is not a great way wrong, is it?

Ans. No, sir; it may be $130 or so.

Int. Then this bugbear about their not being correct, and about money not being accounted for seems to be all wrong, does it?

Ans. Well, the cash ac. seems to be in great error; there is some $1,100, and it does not appear how that has gone.

Int. The deposition of Drummond accounts for that $1,100 00.

Ans. That, I do not know how it was accounted for.

By Mr. Nicholes:

Int. You say the cash is about $1,100 short?

Ans. Yes, sir, about that.

Int. To whome should it be charged?

Ans. It says "discrepancies in cashies ac.;" it refers, so far as I understand it, to Mr. Payne's administration.

And the said def't Hugh Maher, further to maintain the issue on his part, then recalled Geo. W. Ford, who testified on his re-examination as follows:

Int. How much dilligence was used by Drummond & Ford in collecting these ac's?

Ans. I do not know that any; I told you before that Drummond had the management of the thing; I guess there was not a great deal taken; as I told you, I never went but these two times, and twice that I went
188 where Mr. Drummond had been before; I think there was not much dilligence; at that time Mr. Drummond was away for a considerable portion of the time, and I had no knowledge of the books or the ac.; Mr. Quigg would know more about the diligence than I should; but I think there was very little used.

Int. What, if anything, was said by Mr. Cross as to the dissolution of the partnership between Mr. Maher and Mr. Kelley at the time this last contract was made?

Ans. They talked that all over.

Int. What was said then?

Ans. The question was discussed as to the liability of a man signing after dissolution.

Int. At what time did they say the dissolution took place at that time?

Ans. Some months previous as the question came up in regard to Kelly's signing the contract.

And said witness on his further cross-ex. testified as follows, to wit:

Int. In the efforts that was made to collect these accounts, did you not yourself attempt to collect some of them?

Ans. Only these two or three that I remember of.

Int. Did you not make some attempts and met with ofsetts?

Ans. I think I never made any attempts, except in one or two cases; one on the south side of this city; Mr. Drummond was in New York at the time.

Int. Did you not have some suits in connection with some of the ac.?

188½ Ans. I heard of a suit before DeWolf; it was dismissed; Mr. Kelly said he had rec. the money.

Int. There was trouble about them, was there not?

Ans. There was talking about the private ac. of Mr. Kelly's; there was not many of them tried.

By Mr. Munroe:

Int. They beat you in all that were tried, did they not?

Ans. Not that I know of—not by trial.

The said pl'ff then recalled Nathan B. Payne, who testified as follows:

Int. Do you recollect some time in Feb.—the last term of the court any way—that you and I called upon Mr. Flemming?

Ans. I do, sir.

Int. State to the jury what conversation was had with Flemming in regard to any conversation that Mr. Maher and Mr. Cross had together in regard to the release or discharge of Mr. Maher on the turning out of this property.

Ans. He said that he did not remember.

Int. He said he did not remember then having any conversation, and afterwards he said he did not remember a conversation about that?

Ans. The day before that I went over to see him, and to see if he remembered any conversation between any of the parties; he said it was a
189 long time ago, and he did not remember.

Int. Come to the time that we were there.

Ans. I asked him to sleep over it and see if he could not remember, and Mr. Carey and myself would come up next day. Next day we walked up there together, and he was in the store, busy at the time; Mr. Carey interrogated him as to his knowledge of any conversation that he had heard as between Kelly and Maher and Cross and Maher, and he said he did not think he had ever heard any; if he did, he should not have remembered it; that he

had not remembered anything since the time I was up before; that he had always gone out of the way.

Int. Do you remember yourself of having asked him if he remembered any conversation about a release or discharge?

Ans. Mr. Carey asked him several questions or put several points to him, to see if he could remind him, but he did not succeed; and as he stopped, I asked him if he had ever heard Mr. Maher claim that he was released from paying our folks, and he said that he had not; that is, that he did not recollect.

Int. Did he not recollect any conversation between the parties?

Ans. No, sir.

Int. How long were you there?

Ans. From half an hour to an hour.

Int. How did I go there with you?

190 Ans. From the fact of my saying that he would try if he could remember.

And the said pl'ffs, further to maintain the issue on their part, produced Robert J. Hunt, who, being duly sworn, testified as follows, to wit:

Int. I merely want to ask you whether you was at any time bookkeeper of Kelly & Co., and if so, when?

Ans. Yes, sir; I went there on the 17th April, 1860, and I quit their employ about the 15th day of Dec., in same year. I do not exactly recollect the date, but I think it was about the 17th April, 1860, that I went, and I quit on the 15th Dec., 1860.

Int. Do you recollect any card being put up in the office whilst you was there?

Ans. No, sir; not the time I was there.

Int. Do you recollect any card being put up afterwards when you went up there?

Ans. I have seen that card, (Exhibit H,) I think. I never noticed it particularly, but I think I have seen it there.

Int. When was it? How long before the 15th of Jan., 1861?

Ans. I could not say positively; I should think somewhere along two or three weeks.

Int. Before Mr. Payne came?

Ans. Yes, sir.

Int. Where was that card?

191 Ans. It was over one of the door frames in the office.

Int. It was not there when you left?

Ans. No, sir.

Int. But it put up after you left, and before Mr. Payne came?

Ans. Yes, sir.

Which was all the testimony taken or offered in the case.

The court then instructed the jury orally, of which the following is believed to be a substantially correct report, to which instructions no objection was made by either party:

GENTLEMEN OF THE JURY: I will try to explain to you the rules of law which are applicable to this case, and refer to the facts in such a way as that you will understand how you are to apply them to the law of the case.

Crawford, Cross & Co., the pl'ffs, in 1860 were coal dealers in Cleveland, and at the same time Kelly & Maher, the def'ts, were also coal dealers in this city, and on the 4th Aug., Mr. Kelly being in Cleveland, made a contract with Crawford, Cross & Co., which has been read to you, the purport of

which was this: that Crawford, Cross & Co. were to supply Kelly & Co. with certain quantities of bituminous coal; that the coal was to be furnished at Cleveland; that Kelly & Co. were to advance the freight and insu-
192 rance; that upon its arrival here they were to dock and sell it, to guarantee the payment of all bills and accounts of sale, for which no charge was to be made, except for the actual cost of docking and delivering the coal, which in no case was to exceed 45 cents per ton. When the coal was sold the contract prescribed the manner in which the proceeds of the sales were to be divided between the parties; accounts were to be kept correctly, and Crawford, Cross & Co. were to be furnished with the accounts, and the money received was to be remitted. The contract provided that the coal was to remain the property of Crawford, Cross & Co. There was a memorandum added, the date of which is not contained in the memorandum itself, which declared that whatever coal should remain unsold on the 1st May, 1861, might be taken by Kelly & Co. if required, at prices fixed in the contract. You will recollect that there is annexed to the contract or schedule the price at which the coal was to be furnished, and which was to be the rule by which the profits were to be ascertained. On the 10th Jan., 1861, a memorandum was also added to the contract, which provided that the contract was not to be in the nature of a partnership between the parties of any kind whatever, but that all the coal furnished was to remain the individual property of Crawford, Cross & Co. till it was sold, which last
193 provision was substancially contained in the original contract. There was also contained in this memorandum thus added, a clause that from and after the 15th Jan., 1861, Crawford, Cross & Co. were to furnish a competent bookkeeper to Kelly & Co., for the purpose of keeping correct and accurate books, and that Kelly & Co. should pay $25 a month whilst the bookkeeper was employed, and that he was to be considered in the actual possession of the coal, as the agent of Crawford, Cross & Co. Now, that is the contract under which these transactions took place, and, of course, by which the rights of the parties are to be determined, and it is the duty of the court to state to you what the rights of the parties were under this contract. As the court understands the contract, the coal was to be delivered by pl'ffs to the def'ts, to be sold by the latter under the terms and stipulations set forth in the contract. Whenever the coal was sold and the money received by the def'ts, the def'ts became liable immediately, according to the terms of the contract, for whatever money they had in their hands, which belonged to the pl'ffs, and the pl'ffs had a right on non-payment to bring an action for money had and received against them, the only effect of the special contract being that when the def'ts were called to account for the money they had in their hands belonging to the pl'ffs, the manner in which the account
194 should be rendered was to be determined by the terms of the special contract. And therefore I have no doubt that for whatever coal the def'ts sold under this contract prior to the commencement of this suit, and for which they had rec'd the money, the pl'ffs can maintain an action against them for moneys had and received. But I do not think that under the count for money had and received, that the pl'ffs could maintain an action against the def'ts for coal which had been sold on credit, and which had not been paid for at the commencement of the suit; neither do I think, under the contract, that the plaintiffs could maintain an action for goods sold and delivered to the def'ts, and which the latter had sold to others, precisely as though originally purchased by themselves. Therefore, you will perceive, the court does not coincide in the view taken of the clause in the contract, in relation to the guarantee by counsel for the pl'ffs. I hold that under this clause the defendants can not be held responsible as for goods sold and delivered to the def'ts, because the goods were not in fact sold and delivered to

the def'ts. They can only be held responsible by virtue of the special clause in the contract which provides that when the coal is sold they are to guarantee the payment of the bills and accounts. But there is no contro-
195 versy that the coal (about 4,000 tons) was forwarded under this contract by the pl'ffs, and received by the def'ts, and the de'fs, of course, are bound to account for the coal which they received; they are bound either to produce the coal, or to show that it has been sold or disposed of under the contract, and the main controversy turns on this, whether they have properly accounted for the coal. It seems that in Jan., 1861, the pl'ffs sent a clerk here, in compliance with the addition to the contract, to which I have allready adverted as having been made on the 10th of Jan. Mr. Payne, who has been introduced as a witness before you, was sent as the bookkeeper to take charge of the books. His testimony is before you, and you will recollect it without the court particularly calling your attention to his various statements. Now, I think a pertinent enquiry is, What was the state of the accounts between the parties at that time, because, it would seem from the evidence that the coal of the pl'ffs, whatever there was, had been seized by virtue of execution againts the def'ts, and that the pl'ffs took possession of the coal by writ of replevein. Now, at that time there was an indebtedness in consequence of money received for coal sold by the defendants (and delivered by the pl'ffs under the contract) a credit for what had been paid to the plaintiffs, and the defendants were also responsible, under their special guarranty, for whatever coal they had sold on credit. Are
196 you satisfied from the evidence that the def'ts have paid and discharged that indebtedness, whatever it was, for money had and received. It is claimed on the part of the def'ts, in the first place, that so far as Mr. Maher is concerned there was an arrangement made, by which various fixtures, property and accounts, were turned over to Cross, one of the pl'ffs, upon an agreement that it was to be a satisfaction of the indebtedness of all claims that were due from Mr. Maher to Crawford, Cross & Co. That is a question of fact to be determined by you. You must be satisfied that it was done upon a distinct understanding on the part of Mr. Maher, that the property was so turned over; and on the part of Mr. Cross, that the property was so received not as a collateral security merely, but in full satisfaction and discharge of the indebtedness. If collateral merely, the original indebtedness remained against Mr. Maher. If upon a distinct understanding that the property was so turned over, as well upon the part of Mr. Maher as of Mr. Cross, that it was to be a satisfaction and discharge of the indebtedness, then, of course, Mr. Maher is released. It depends altogether as to how you may find the facts in relation to these matters, which are before you.
We have not before us any evidence of such a distinct agreement
197 made between them, either oral or in writing. All that we have is the statement of the various witnesses as to what has been said by the parties and of some transactions that have taken place. Now, it is for you to determine whether you believe from the conduct or declaration of the parties that there was such an agreement. For example, Mr. Ford testifies that immediately preceding the contract being made in Sept., 1861, Mr. Maher claimed that these accounts had been turned over in full satisfaction; Mr. Cross said they had been turned over as collateral security.

Now, it would be improper for the jury to infer from such testimony alone that they were turned over in full satisfaction, for when it was claimed by Mr. Maher that it was so done, Mr. Cross repudiated the idea, and there was only a reiteration on the part of Mr. Maher and scilence on the part of Mr. Cross. Under the circumstances his scilence, after he had repudiated the construction which Mr. Maher sought to place upon it, is hardly to be

construed into an assent previously desired; and besides, it is for you to say whether the conduct of Mr. Maher subsequently is consistent or not with his having made any such agreement. Is the interest which he took in
198 the various transactions subsequently consistent with the idea that he had nothing farther to do in relation to this property? for you should take all these facts into consideration—the admissions and statements of the parties as given by the witnesses, and the conduct of the parties respectively—in order to determine whether there was this agreement and understanding between them. Of course you will perceive that this is an important fact; and it is a matter of fact entirely to be found by the jury, because if it be true that these accounts, fixtures, and so on were turned over by Mr. Maher to Mr. Cross and received by Mr. Cross in full satisfaction, it puts an end to all claim against Mr. Maher. Now, Mr. Cross was in this city on the 13th Sept., 1861, and made another contract with Mr. Kelly, which has been referred to, and this of course is a distinct and entirely independent ground upon which the pl'ffs seek to put the case. On the 13th Sept., 1861, the partnership between Mr. Maher and Mr. Kelly had been dissolved, and Mr. Kelly had no authority under the law to make this contract so as to bind Mr. Maher without his consent. He had no right, in other words, to use the firm name of Kelly & Co. in that way. This was a contract by which the parties agreed that an accountant by the name of Geo. H. Quigg should take the books, look into them and determine what was the state of the ac-
199 counts between the parties and strike a ballance and report it, and the parties should be bound by that ballance; and by the terms of this contract certain accounts and property were turned over to the pl'ffs, and they agreed to use all reasonable diligence to collect the amounts; and it was further provided by the contract that Drummond & Ford, attorneys, were to superintend the collection of the accounts and sell the personal property. Under this contract, of course, whatever money was collected upon these accounts was to be credited to the def'ts, and the plaintiffs claiming under this contract are bound by it, and whatever money was collected by Drummond or Drummond & Ford is to be a credit, but you must be satisfied that the money has been actually collected. Mr. Ford's testimony is a little vague and indefinite as to the amount. He states in general terms that he should think $2,000 has been collected. There is some other testimony as to the actual amount which has been collected. Mr. Quigg says that there was collected or was upon the books $. I infer from Mr. Ford's testimony that he thought there was more money collected than appeared on the books, though he could not name the amount, and it would appear his conclusion was correct. Still the amount is so uncertain that it would hardly be a safe guide for the jury. If I recollect right one witness testifies
200 that Drummond said at one time that he had remitted a very considerable sum, and afterwards it turned out that he had only remitted $200, so that it would seem to justify the conclusion of Mr. Ford that there was some unfair dealing by Drummond; but still under this aspect of the case he was the agent of the plaintiffs and under their control, and the plaintiffs were bound by his acts; whether he violated his trust or not is immaterial. So far as the plaintiffs are concerned they are bound by his receipt of the money. Mr. Maher not being bound originally by the terms of this contract, it does not follow but that he may be bound in consequence of having done or said something subsequently by which he became a party to the agreement; and the next question for you to determine is whether he became a party to this contract by his subsequent acts. In order to be a good ratification it was necessary that he should know the nature and character of the contract and for what purpose Mr. Quigg had charge of the books. He must have known that Quigg was in possession of the books for the purpose stated in this contract. If he knew that and knew the existence of the con

tract, then it is a strong circumstance from which the jury may infer, if they believe Mr. Quigg, that he assented to its terms; but it is for the jury to say whether he knew of the existence of the contract, and whether he knew the object for which Quigg was there; and you will recollect that Quigg
201 states (and there is no proof to contradict it and there is a good deal of testimony corroborative of it besides) that Mr. Maher brought him some of the books; and he also stated various facts tending to show that Mr. Maher took an interest in his work, but it is proper also that you should bear in mind what was stated by Mr. Ford as to what took place at the time this contract was entered into; that is, that there was a sort of understanding that the terms of this contract were to be kept secret from Mr. Maher. But, independent of all that, if it were true that, in relation to this transaction, Drummond was the agent of Maher and had discretionary authority in the matter, then of course the acts of Drummond would bind him, and notice to Drummond would be notice to Maher. On the whole the court leaves it as a question of fact to be found by you whether Maher had ratified this contract and become a party to it by his subsequent declarations or acts, having full knowledge of the existence of the contract. If he did he was bound by it just as much as if he were a party to it; if not, then of course it does not impose any obligation upon him. By the terms of this contract Quigg was to examine the books. Now, the books are before you; they were the books of Kelly & Co. They purport to contain an ac., as I understand, of these coal transactions, and, as far as they are correct accounts, of course they are evidence as to the rights of the parties, and it may be proper in this case to investigate very fully, in order to do justice between the parties,
202 the state of these accounts, unless, indeed, you believe that Mr. Maher is a party to this contract by ratification, in which event of course that is the rule which is to govern the rights of the parties. But if you should come to the conclusion that he is not bound by this contract, then it would be proper to look into these books in order to determine what is the condition of the accounts between these parties. It would seem by the statement of the accountant, whose deposition is introduced, that there has been some addition made to the accounts. Now, as far as those additions or alterations were made, which were justified by the accounts themselves, then it was perfectly proper and competent for Mr. Quigg to make them, but I do not think it was proper for him to manufacture accounts under this contract refering the matter to him. The words are, "the exact amount to be ascertained from the books of said Kelly & Co. by Geo. H. Quigg, under the supervision of the parties to this agreement, and that amount so found to be due and owing to be final." Now, I understand that to refer to the books of account, and that Quigg was confined to the book of ac'ts, and he could not go outside of those books; so that whatever appeared to be the state of the accounts between these parties by the books, Mr. Quigg had the right to show, and you have the same right precisly that Mr. Quigg had, and you, under one aspect of the case, can look into these books and accounts
203 in order to determine the state of the ballance between the parties.

These parties are sued as partners; they are to be held responsible as partners; they cannot be held responsible in any other way. There must be, therefore, in order to hold them, acts done by one of the partners whilst the partnership existed, or acts done by both after the partnership was dissolved. And one of the rules of law in reference to the dissolution of partnership is this: the actual dissolution of partnership at the time it was dissolved would not be binding upon these plaintiffs except from the time they had notice of the dissolution; but of course notice to the agent is notice to the principal.

A juror. I believe we have had no evidence of any notice.

The court. Except it be to Mr. Payne, and I think, gentlemen, that notice to Mr. Payne must be considered substantially notice to the plaintiffs, because he was acting here for the plaintiffs. I agree with Judge Arrington, that Flemming's testimony on that point was quite unsatisfactory. The weight to be given to his testimony is to be considered by the jury, but it was a strong circumstance that the counsel for the def'ts did not introduce the notice referred to by him at all, and left it in that way. [Here the court read extracts from Mr. Fleming's testimony on that point.] Now, that is all he says in relation to the matter, and there is no evidence that Mr. Payne knew the contents of that notice. It is proper for the jury to take all the
204 subsequent acts of Maher together, his conduct and declarations, in order to determine what is the true character of this transaction.

At the suggestion of the court, the book of the def'ts introduced in evidence by pl'ffs, the minutes of the reporter, and the depositions were delivered to the jury before retiring, by consent of counsel.

The jury having retired and duly considered of their verdict, reported the following.

"We, the jury, report the plaintiffs' damages as to defendant Kelly, and we find the issue joined on the plea of the defendant Hugh Maher for the plaintiffs, and we report and assess the plaintiffs' damages to the sum of $6,033 49," which the jury found as their verdict in said cause, and upon enquiry by the court, the jury stated that they found that defendant Maher had ratified the contract of Sept. 13, 1861. And forasmuch as the evidence aforesaid, and the several objections of defendant Hugh Maher, by his counsel, to the introduction of said contract, marked Exhibit A, as evidence, and to the introduction of said books, and the said testimony of the said Payne as to the statements of the said Kelly, and the several rulings and decisions of the said court in overruling said several objections, and each and every of the said rulings and decision of said court in overruling all and every objection of said defendant Hugh Maher, to the introduction of testimony in said trial do not appear of record, the said defendant Hugh Maher prays the said court to sign and seal this his bill of exceptions, and make the same a part
205 of the record, which is done accordingly.

THOMAS DRUMMOND. [SEAL.]

Dated the day of , A. D. 1864.

Endorsed: Filed March 29th, 1864.

WM. H. BRADLEY, *Cl'k.*

206 And afterwards, to wit, on the ninth day of April, in the adjourned March term of said court, A. D. 1864, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLY AND HUGH MAHER. } Assumpsit.

Now come the parties, by their attorneys, and thereupon comes on to be heard the motion of the defendant Hugh Maher for a new trial, which, after argument of counsel, the court takes under advisement.

And afterwards, to wit, on the thirteenth day of April, in the term and year aforesaid, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE
vs.
EDWARD KELLEY AND HUGH MAHER. } Assumpsit.

207 The court having considered, and being now fully advised upon

the motion ofthe defendant Hugh Maher, heretofore entered herein by his attorneys for a new trial of this cause, overrules the same and awards judgment upon the findings of the jury.

It is thereupon, considered and adjudged by the court that the said plaintiffs do have and recover of and from the said defendants the said sum of six thousand and thirty-three dollars and forty-nine cents, the damages as assessed and reported by the jury, together with their costs and charges by them about their suit in this behalf expended, amounting to the sum of one hundred and eighty-five dollars and ninety-four cents, and that they have execution therefor.

On this day, to wit, on the twenty-second day of April, A. D. 1864, came the said defendants Edward Kelly and Hugh Maher, by their attorneys, and filed in said clerk's office in said entitled cause their appeal bond, which is in the words and figures following, to wit:

208 In error to the circuit court of the United States for the northern district of Illinois, March term, A. D. 1864.

EDWARD KELLY AND HUGH MAHER
vs.
LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE.

Know all men by these presents that we, Hugh Maher, and Edward Kelly, and Joseph McDonald, are held and firmly bound unto the above-named Lemuel Crawford, David W. Cross, and Henry B. Payne, in the sum of ten thousand dollars, to be paid to the said Lemuel Crawford, David W. Cross, and Henry B. Payne, their executors *executors* or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this twenty-second day of April, A. D. 1864.

Whereas the above-named Edward Kelly and Hugh Maher have
209 prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled cause, made in favor of said Lemuel Crawford, David W. Cross, and Henry B. Payne, by the said circuit court: Now, therefore, the condition of this obligation is such, that if the above-named Edward Kelly and Hugh Maher shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

EDWARD KELLY. [SEAL.]
HUGH MAHER. [SEAL.]
JOSEPH McDONALD. [SEAL.]

Sealed, and delivered in presence of.

Endorsed: I am satisfied with the within bond.

H. S. MONROE.

Approved.

THOMAS DRUMMOND.

Filed April 22d, 1864.

WM. H. BRADLEY, *Clk.*

210 NORTHERN DISTRICT OF ILLINOIS:

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify that the foregoing is a true transcript of the record and all the proceedings had in the cause wherein Lemuel Crawford, David W. Cross, and Henry B. Payne are the plaintiffs,

and Edward Kelley and Hugh Maher are the defendants, as the same appears from the records of said court now in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twelfth day of November, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

211 THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said court before you, between Lemuel Crawford, David W. Cross, and Henry B. Payne, and against Edward Kelly and Hugh Maher, a manifest error hath happened, to the great damage of the said Edward Kelly and Hugh Maher, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,
212 with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-first day of April, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Filed 5 Dec., 1864.

213 UNITED STATES OF AMERICA, *ss:*

To Samuel Crawford, David W. Cross, and Henry B. Payne, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Hugh Maher and Edward Kelly are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas Drummond, one of the justices of said court, this 22d day of April, 1864.

THOMAS DRUMMOND.

We acknowledge service of the within citation, this day of April, 1864.

H. S. MONROE,
Att'y for Defendants in Error.

Filed December 5, 1864.

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

EDWARD KELLY and
HUGH MAHER,
Plaintiffs in Error,
vs.
LEMUEL CRAWFORD,
DAVID W. CROSS and
HENRY B. PAYNE,
Defendants in Error.

ABSTRACT OF RECORD, AND BRIEF OF CASE.

Supreme Court of the United States.

HUGH MAHER and
EDWARD KELLY,
Plaintiffs in Error,
vs.
LEMUEL CRAWFORD,
DAVID W. CROSS, and
HENRY B. PAYNE,
Defendants in Error.

BRIEF OF CASE.

ABSTRACT OF RECORD.

On the 4th day of August, A. D. 1860, the plaintiffs below, under the firm name of Crawford, Cross & Co., entered into a contract to furnish defendants below, under the firm name of Kelly & Co., with coal to be sold by them for plaintiffs below, upon commission. On the 10th day of January 1861, a supplemental agreement was entered into between the parties, providing that an agent of plaintiffs below should keep the books and have the actual possession of the coal after the 15th of January 1861. On the 13th of September, 1861, after the firm of Kelly & Co. was dissolved, Kelly, in the name of said firm of Kelly & Co., entered into an agreement with plaintiffs below to submit to the decis-

ion of George H. Quigg, the exact amount due from defendants below to plaintiffs below, he to ascertain said amount from said books of Kelly & Co. Upon this agreement of submission and the alleged decision or award of the said Quigg under said agreement, the suit below was brought. The verdict and judgment below was founded on said submission and award, and was for the amount of the award with interest. In the said agreement submitting the said books to Quigg, all the accounts in exeibit "A" thereunto attached, and other accounts were assigned to plaintiffs below to be collected by them, and if more should be collected from said accounts by the plaintiffs below than should be found by Quigg in favor of plaintiffs below, said plaintiffs agreed to pay the defendants below the excess, but if less, the defendants below agreed to pay the balance to plaintiffs below.

The said agreement of submission was offered in evidence by plaintiffs below without said exhibit "A." The defendants below objected to its being received in evidence without said exhibit being produced or its absense accounted for, and excepted to the ruling of the court in receiving the same in evidence.

After said Quigg had retained the possession of the books submitted to him for the period of about nine months, and had added a large amount of new and original matter therein, he wrote a balance sheet in the books which was offered by the plaintiffs below as the award of said Quigg. But the defendants below objected to the books being received in evidence because said Quigg had changed the books and added new and original matter therein; and to the receipt of the balance sheet in evidence because said Quigg had, in making up said balance sheet, included said new and original matter which he was not authorized to do by said submission, and excepted to the ruling of the court in receiving said books and said balance sheet in evidence against their objection.

PAGES OF PRINTED RECORD.

Pages 1 and 2, Placita, bond for costs, præcipe, summons and marshall's return.

Pages 2, 3, 4 and 5, declaration of plaintiffs below. The first count of the declaration is in words and figures following, to wit:

Circuit Court of the United States, northern district of Illinois, October term, 1862.

United States of America, northern district of Illinois, ss:

Lemuel Crawford, David W. Cross and Henry B. Payne, who are citizens of the State of Ohio, doing business under the name, style and firm of Crawford, Cross & Co., by Henry S. Monroe, their attorney, complain of Edward Kelly and Hugh Maher, who are citizens of the State and northern district of Illinois, defendants in this suit, who have been duly summoned in an action of assumpsit, for that, whereas, heretofore, to wit: on the thirteenth day of September, eighteen hundred and sixty-one, at the city of Chicago, to wit: in the northern district of Illinois, the said defendants, under the name, style, and firm of Kelly & Co., entered into an agreement, in writing, with the said plaintiffs, which is in the words and figures following, to wit:

Know all men by these presents that, whereas, Kelly & Co. of Chicago, Illinois, are justly indebted to Crawford, Cross & Co., of Cleveland, Ohio, in the sum of from four to six thousand dollars upon joint account, *the exact amount to be ascertained from the books of said Kelly & Co., by one George H. Quigg*, under the supervision of the parties to this agreement, and that the amount so found to be due, and owing, to be final; and in consideration of such indebtedness, and the

further consideration that said Crawford, Cross & Co. agree not to sue said Kelly & Co. upon such indebtedness before the 13th day of June, A. D, 1862, unless one of the firm of said Kelly & Co. shall remove out of this State, we, the said Kelly & Co., do hereby grant, bargin, and sell, assign, transfer, and set over unto the said Crawford, Cross & Co., *all the accounts hereunto attached and marked exhibit "A,"* together with two wheelbarrow scales, one six tons Duryea & Forsyth's scales, three coal carts, four coal screens, one office desk, and all other accouts due and owing to said Kelly & Co., upon their coal books, except the accounts now enjoined in chancery, which said chancery suit is now pending. It is further agreed by the parties hereto that the said Crawford, Cross & Payne, are to put the said accounts and each of them into speedy collection, and use all reasonable due diligence to collect the amounts found to be due on each and all of said accounts as far as the same can be done; and after paying the expenses of collecting said moneys, the balance so collected shall be applied to the extinguishment of the indebtedness of said Kelly & Co. to Crawford, Cross & Co., as ascertained by the aforesaid George H. Quigg. It being distinctly understood that the said Quigg is to ascertain the amount due, to which the parties hereto now agree is to be the actual amount and the sum so intended to be secured by the sale and transfer of the accounts and property herein mentioned. Should there be any balance left after collecting the sums herein referred to, the said Crawford, Cross & Co. agree to pay the same by their agents or attorneys over to Kelly & Co., and should the said sum of accounts and the personal property herein referred to be insufficient to pay the sum found (hereafter) to be due to Crawford, Cross & Co., then, and in that case, the said Kelly & Co. agree to pay the balance remaining unpaid to the said Crawford, Cross & Co. It is further agreed by the parties hereto that Messrs. Drummond and Ford, attorneys of Chicago, are to superintend the collection of said accounts, and the sale of the personal property hereby and herein transferred to the said Crawford, Cross & Co., and for such purpose are to have the custody and control of said books of Kelly & Co., and the said accounts, for which services they are to receive the usual rate of per cent. for collections and the usual fees in case of litigated suits.

In witness whereof we hereunto set our hands, as also to a duplicate, this 13th day of September, A. D. 1861, at Chicago, Illinois.

CRAWFORD, CROSS & CO.

KELLY & CO.

In and by which agreement the said defendants, in consideration of the indebtedness mentioned in said agreement, as due from the said defendants to the said plaintiffs, and in consideration that said plaintiffs agreed not to sue said defendants upon said indebtedness before the thirteenth day of June, 1862, promised and agreed to submit the exact amount due from said defendants to the plaintiffs to the decision of one George H. Quigg, *he to ascertain said amount from the books of said defendants*, and also that the amount so found to be due to the plaintiffs from the defendants by said Quigg should be final, and also the said defendants promised and agreed to pay to the said plaintiffs the balance of the amount found to be due by said Quigg, which should remain unpaid after deducting the amount received by said plaintiffs from the avails of said accounts and sales of said personal property. And said plaintiffs aver that said Quigg did, under the supervision of the said defendants, ascertain from the books of said Kelley & Co., defendants, the amount due from the defendants to the plaintiffs, and fixed said sum at the amount of fifty-four hundred and seventy-four dollars and thirty-four cents, of which the said defendants had notice, to-wit, at the time and place aforesaid. And the said plaintiffs aver that heretofore, to-wit, *on the day of A. D.* 186 , at Chicago, in said northern district of Illinois, the said Drummond & Ford proceeded to sell said personal property, and to put into speedy collection *each and every of said accounts*, and did then and there sell said personal property, and diligently did seek to collect *said accounts* except such as were enjoined in chancery; and the plaintiffs aver that the proceeds of said sales of personal property and of said collections amounted to a small sum, to-wit, the sum of *five hundred dollars*, and

that the usual fees of collection, to-wit, the usual fees of collecting said sum, was a large sum, to-wit, the sum of TWO HUNDRED DOLLARS, and that the said accounts not collected were and are worthless. And the plaintiffs further aver that said personal property and said accounts were then and there insufficient to pay the aforesaid sum found to be due and owing from said defendants to said plaintiffs. And the said plaintiffs further aver that they did not sue said defendants before the thirteenth day of June, 1862; and further, that the said plaintiffs in all respects, performed and fulfilled their part of said contract by allowing said Drummond & Ford, and by urging upon them the diligent collection of said accounts, and a speedy, careful and honest sale of said personal property. And the said plaintiffs aver that they delivered into the control and custody of said Drummond & Ford said personal property, *said books of account* and *said accounts*. And the said plaintiffs aver that afterwards, to-wit, on the day and year aforesaid, at the place aforesaid, they applied the proceeds of said sale of personal property and collection of said accounts to the extinguishment of the debt of said defendants to said plaintiffs. And the said plaintiffs aver that over and above the said sum, so as aforesaid applied in extinguishment, there remains due and unpaid of the sum so as aforesaid found to be due and owing by said Quigg from said defendants to said plaintiffs, to-wit, the sum of ten thousand dollars. Yet the said plaintiffs aver that said defendants have not paid said sums, although often requested so to do.

The declaration also contained the common counts in assumpsit.

Pages 7 and 8 separate pleas of Hugh Maher, as follows:

1st. General issue.

2d. Plea to the first count denying the execution of the agreement set out in said first count, and verified by affidavit of Maher.

3d. Plea to said first count, that the firm of Kelley & Co. was dissolved in May, 1861, and that the plaintiffs below had long before the

execution of said agreement actual notice of such dissolution, and that said agreement was executed by Kelly without the knowledge or consent of said Maher, long after the dissolution of said firm, verified by affidavit of Maher.

Pages 8 and 9, Stipulation signed by the attorneys of plaintiffs and defendants in words and figures following, to-wit:

CIRCUIT COURT OF THE UNITED STATES,

FOR THE NORTHERN DISTRICT OF ILLINOIS.

LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE,
vs.
HUGH MAHER, Impleaded with EDWARD KELLY.
} *Assumpsit.*

It is hereby stipulated by and between the said Hugh Maher, impleaded, &c., with the said Edward Kelly, and the above named plaintiffs, that the said Hugh Maher, on the trial of this cause, under the general issue filed herein, shall have the right to introduce any and all testimony that he may have the right to introduce to sustain any defence that he has or may have to the above case, and to make any defence that he has or may have to the same, in the same manner in every respect as though the said Hugh Maher, impleaded, &c., had filed in said cause special pleas under which such testimony could be introduced and defence made, and that no objection shall be made to the introduction of any testimony by the said Hugh Maher, on the trial of said cause to sustain any defence, or to the making of any defence

that he has or may have to said action for the want of sufficient or proper pleas or for the want of proper affidavits thereto to enable him to make such defence.

JULY 2, 1863.

D. C. & I. J. NICHOLLS,
Att'ys for Hugh Maher.

HENRY S. MONROE,
Att'y for Plaintiffs.

Endorsed: Filed July 2, 1863.

WM. H. BRADLEY, *Clerk.*

Page 9, Appearance for Kelly withdrawn and his default entered March 26th, 1864, Case came on for trial.

Page 10, March 29, Verdict for plaintiffs below for $6,033.49, and motion for new trial entered by Maher.

Pages 10 to 92, Bill of exceptions, containing the evidence in the case.

Pages 10, 11, 12 and 13, First witness for plaintiffs, George H. Quigg, deposed that he knew the parties to the suit except Payne, that he had seen the agreement set out in the declaration, and annexed to his deposition, marked "Exhibit A," that the signature of Kelly & Co. is by Kelly, that the agreement was first shown him by Drummond, that Kelly brought him a part of the books and Maher the balance, that he was employed upon the books from the middle of September, 1861, to the middle of June, 1862, nine months, that in June, 1862, he made a general balance of the books, that from such balance there appeared to be due from defendants to plaintiffs $5,474.34, that

according to the duty imposed upon him by the agreement, he made the balance on the ledger, and at the request of Cross he made a copy from the ledger and handed it to him. Crawford, Cross & Co.'s balance was increased $1,040.07 for profits by the closing entries upon the ledger of Briar Hill or Chippewa coal account.

Exhibit C is the Ledger. Exhibit D is the Journal. Exhibit E is the Day Book. Exhibit F. is the Coal Register, and Exhibit G is the Cash Book. They are the books of Kelly & Co.

And further to maintain the issue on their part, the said plaintiffs, by their counsel, produced and offered in evidence the contract annexed to said deposition of said George H. Quigg, and marked "Exhibit A;" which contract is in words as follows, to wit: "Know all men by these presents, that whereas, Kelly & Co., of Chicago, Illinois, are justly indebted to Crawford, Cross & Co., of Cleveland, Ohio, in the sum of from four to six thousand dollars, upon joint account, *the exact amount to be ascertained from the books of the said Kelly & Co., by one George H. Quigg*, under the supervision of the parties to this agreement, and that the amount so found to be due and owing to be final; and in consideration of such indebtedness, and the further consideration that the said Crawford, Cross & Co. agree not to sue said Kelly & Co. upon such indebtedness before the 13th day of June, 1862, unless one of the firm of Kelly & Co. shall remove out of this State, we, the said Kelly & Co., do hereby grant, bargain, and sell, assign, transfer and set over unto the said Crawford, Cross & Co., *all the accounts hereunto attached and marked 'Exhibit A,'* together with two wheelbarrow scales, one six-tons Duryea & Forsyth scales, three coal carts, four coal screens, one office desk, and all other accounts due and owing to said Kelly & Co., upon their coal books, except the accounts now injoined in chancery, which said chancery suit is now pending. It is further agreed by the parties hereto that the said *Crawford, Cross & Co. and Payne* are to put the said accounts, and each of them, into speedy collection, and use all reasonable due diligence to collect the amounts found to be due on each and all of said accounts, as far as the same can be done, and after paying the ex-

penses of collecting said moneys, the balance so collected shall be applied to the extinguishment of the indebtedness of the said Kelly & Co. to Crawford, Cross & Co., as ascertained by the said George H. Quigg. It being distinctly understood that the said Quigg is to ascertain the amount due, to which the parties hereto now agree is to be the actual amount, and the sum so intended to be secured by the sale and transfer of the accounts and property herein mentioned; should there be any balance left after collecting the sums herein referred to, the said Crawford, Cross & Co. agree to pay the same by their agents or attorneys over to Kelly & Co., and should the said sum of accounts and the personal property herein referred to, be insufficient to pay the sum found (hereafter) to be due to Crawford, Cross & Co., then and in that case the said Kelly & Co. agree to pay the balance remaining unpaid to the said Crawford, Cross & Co.

"It is further agreed by the parties hereto that Messrs. Drummond & Ford, attorneys, of Chicago, are to superintend the collection of said accounts, and the sale of the personal property hereby and herein transferred to the said Crawford, Cross & Co., and for such purpose are to have the custody and control of said books of Kelly & Co., and the said accounts, for which services they are to receive the usual rate per cent. for collections and the usual fees in case of litigated suits.

"In witness whereof, we hereunto set our hands, as also to a duplicate, this 13th day of September, A. D. 1861, at Chicago, Illinois.

CRAWFORD, CROSS & CO.

KELLY & CO."

But to the reading of the same in evidence the said defendant, Hugh Maher, by his counsel, did then and there object: 1st. Because Schedule A, mentioned in said contract, was not produced, and because the non-production of said Schedule A, mentioned in said contract, was not in any manner accounted for. 2d. Because said contract was in-

complete without said Schedule A; and, 3d. Because said contract was executed by Kelly, and said Maher was not a partner of Kelly at the time the same was executed, and was not bound by the same; which objection of the said defendant Hugh Maher, by his counsel, to the reading of said contract in evidence, for the reasons aforesaid, to the said jury, the said court did then and there overrule, and decided that said contract might be read and allowed, the same to be read by said plaintiffs in evidence to the jury. To which decision of the said court in overruling the said objection of said defendant and allowing said contract to be read in evidence to the jury, the said defendant, Hugh Maher, by his counsel, did then and there duly except.

Pages 14 to 19, George H. Quigg, on his cross-examination, testified that Drummond showed him the contract, marked "Exhibit A," September 15, 1861, that he received it from him and that he did not recollect of seeing it more than once or twice since, that Exhibit B, which was a copy of the balance entered by Quigg on the books on the 16th day of June, 1862, showing an indebtedness from defendants below to plaintiffs below, does not show the balance from Kelly & Co. to Crawford, Cross & Co. on the 13th of September, 1861, as appeared from the entries on the books at that date, that entries were made upon the books between September 13th, 1861, and June, 1862, the date of said general balance. That Drummond & Ford and said Quigg collected between $1,600 and $1,700. That all the entries upon the books bearing date subsequent to July 24, 1861, were made by the said Quigg after the books came into his hands. That he did not consider it a portion of his duty to present Maher or Kelly a written statement showing the balance of the account, having left a balance sheet on the ledger for the inspection of all parties. That a portion of the charges and credits which leaves this balance were made by said Quigg. That "Exhibit A," referred to in said agreement, set out in the declaration, was not handed to him, and that he never saw the same. That he never showed or informed said Maher that there was such an agreement. That he could not swear that Maher knew what said agreement was. That he did not recollect that he had ever informed said Maher that Drummond had shown him said agreement. That in determining

the balance due plaintiffs from Kelly & Co., he went outside of the books and made use of certain contracts, to wit: The contract set out in declaration and the original contract to furnish coal. That he inferred from the original contract that plaintiffs were entitled to half of the profits on coal, which profits amounted to $2,080.14, one-half of which he carried to the credit of plaintiffs in making up the balance. That if he had determined the balance from the books without reference to any contracts between the parties, the balance would have been reduced $1,047.00 less $200, That there was still apparently enough due on the books to meet the demands of the plaintiffs.

Pages 19 and 20, Re-direct examination, that he collected $400.00 which he retained, that of the amount Drummond & Ford collected they paid to plaintiffs $200.00, that plaintiffs paid witness the balance for his services,that after he had made the balance sheet upon the ledger he delivered the books to Drummond.

Pages 21 and 22, The plaintiff introduced the original agreement between the parties which is in words and figures following, to-wit:

EXHIBIT I.

Mem. of an agreement.—Crawford, Cross & Co., of Cleveland, Ohio, of the first part, and Kelly & Co., of Chicago, Ill., of the second part, witnesseth, that the party of the first part hereby agrees to supply the party of the second part with bituminous coal of the several varieties usually found in the Cleveland markets, to be delivered on board of vessels at Cleveland, at the lowest cash prices, said coal to be delivered at such times and in such quantities as will suffice to stock the yard of said second party at Chicago.

The said second party agrees to advance the freight and insurance on said coal, which shall be contracted for at the lowest possible rates,

to furnish the yard, to dock and sell the coal, and guarantee the payment of all bills of account for sales, for all which no charge is to be made, except for the actual cost of docking and delivering coal to customers, which is in no case to exceed forty-five cents per ton, and to keep accurate accounts of sales and receipts, which shall be rendered weekly to said first party. That from the aggregate receipts of each week shall be deducted the amount due said first party for the coal sold, at the prices as above stipulated, and also the amount due the second party for the insurance and freight on the same as aforesaid, and the remainder shall be divided equally between said parties.

And the proportion accruing to said first party shall be remitted to them punctually with the account of sale, &c., &c., and the balance shall be retained by said second party, and received by them in lieu of all commissions and charges, except the docking and delivering as aforesaid. In all cases when sales are made by cargo, and the coal discharged elsewhere than at the dock of said second party, said second party shall guarantee payment for the same, and shall receive a commission of ten per cent. in lieu of all other charges. All coal to remain the property of the first party until sold and delivered in accordance with the terms of this agreement. Said second party is to deal in no other bituminous coal unless the first party shall fail, after reasonable notice, to furnish a supply as afore provided. This arrangement to continue during the present season, and for such additional time as may be agreed on by said parties.

CLEVELAND, Aug. 4th, 1860.

CRAWFORD, CROSS & CO.

N. B.—It is understood that the present prices of coal delivered on vessels at Cleveland are—

For Briar Hill	$3.00	per ton
For Chippewa	2.60	" "
For Mineral Ridge	2.85	" "

For Pittsburg	3.50	per ton.
For Massilon	2.65	" "
For Slack	1.38	" "
For Nut	1.75	" "
For Mixed	1.60	" "

It is further understood and agreed that all coal remaining unsold on the dock on the 1st day of May, 1861, shall be taken by said second party, if required, at said cash prices to close up the business, unless said parties shall not conclude to continue this arrangement another year.

CRAWFORD, CROSS & CO.
KELLY & CO.

It is hereby expressly agreed and understood by the parties hereto that the foregoing articles of agreement do not, nor are they intended, to form or be construed as a partnership, either special, general, or limited, but all the coals furnished by the parties of the first part are to be and remain the individual property of the said party until sold and delivered in due course of trade in the market in Chicago.

It is hereby further agreed that from and after the 15th day of January, 1861, the said Crawford, Cross & Co. are to furnish a good and competent book-keeper for the firm of Kelly & Co., whose duty it shall be to keep correct and accurate books for the said firm, subject to the inspection of all parties to said articles of agreement, and towards whose salary Kelly & Co. shall pay at the rate of $25 per month during the time said book-keeper is in the employ of said Kelly & Co., said book-keeper to be considered in actual possession of said coal as the agent of Crawford, Cross & Co.

In testimony whereof we hereunto set our hands this 10th day of January, 1861.

CRAWFORD, CROSS & CO.
KELLY & CO.

Page 22. The plaintiffs offered the books submitted to Quigg in evidence.

Pages 22 to 35 show entries made by Quigg in the Day-book after the books had been submitted to him—the larger portion of which are new and original entries made by Quigg not taken from the books submitted to him in any manner, nor made in correction of the same, and all of which were taken into account by Quigg in making up the balance sheet which was offered to show his award under said agreement of submission.

Page 35. June 14th, 1862, an entry is made in favor of plaintiffs and against defendants of $1,040.07 from Quigg's construction of an agreement not submitted to him.

Pages 35 to 39 contain entries from the Journal, being the same entries contained in the Day-book, journalized and made by Quigg subsequent to the time the books were placed in his hands under said agreement, and also numerous other original entries made by Quigg of various transactions of Kelly outside of the business of the firm of Kelly & Co.

Page 39. The Ledger embraces all the accounts contained in the Day-book and Journal.

Pages 39 to 42 contain the balance sheet made by Quigg, in which said balance sheet are included all the entries contained in the Journal and Day-book, excepting the entries made in the Journal subsequent to June 16, 1862, the date of said balance sheet, said balance sheet, page 40, shows the balance in favor of the plaintiffs below against the defendants of $5,473.34.

Page 42. Quigg certified that after a careful and thorough examination of the books of Kelly & Co. submitted to him about the middle of September, 1861, by Kelly & Co. and Crawford, Cross & Co., the foregoing is a correct balance.

Pages 42 to 44 contain the account of Crawford, Cross & Co. which shows the balance of $5,474.34 made by Quigg, in making which balance Quigg had credited Crawford, Cross & Co. $1,040.07 for the gain on Briar Hill coal.

Pages 44 and 45 contain the account of Drummond & Ford, wholly made by Quigg subsequent to the time the books came into his hands, from which it appears that they had collected $1,158.05 of which Quigg had charged Crawford, Cross & Co. $200.

Pages 35 and 46 contain the account of said George H. Quigg, from which it appears that Quigg had collectd of the accounts of Kelly & Co., after the books came into his hands, $490.76, and in which he charged the firm for services $760.35.

Pages 44 to 48 contain the account of Edward Kelly, from which it appears that said Kelly had collected and is charged by said Quigg with having collected of the accounts of Kelly & Co. which had been assigned to Crawford, Cross & Co, after the books came into the hands of said Quigg, and after said assignment, $2,328.20.

Pages 49 to 55 contain the cash account which had been kept by Payne, the agent of the plaintiffs, who also received the cash taken in by the firm for the plaintiffs.

Pages 55 and 56 in said account show that Payne, the agent of of said Crawford, Cross & Co., who kept said accounts, had received $1,157.06 more than he had accounted for to said firm.

Pages 56 and 57 contain entries made in the cash book by Quigg subsequent to the time the books came into his hands under said agreement of submission.

Page 57 shows the amount of coal sold and received.

Pages 57 and 58. Upon the offer of the plaintiffs below to introduce said books, and also said balance account for the purpose of show-

ing the award of said Quigg under said agreement, in evidence, said books containing the aforesaid accounts and entries made by Quigg subsequent to the time the books came into his hands under said agreement, and said new and original matter being included in said balance account, the defendant Maher objected to the introduction of the same in evidence, and to the said balance account therein contained. First, because it appeared from the deposition of said Quigg that all the entries in said books made subsequent to the 24th of July, 1861, were made and entered upon said books by said Quigg subsequent to the time said books were submitted to him under the contract offered in evidence by the plaintiffs and marked exhibit "A," and that original entries were made in said books by said Quigg subsequent to the time said books were submitted to him under said contract, and that said Quigg, by the said contract under which the said books were submitted to him, had no authority to make additions or alterations in said books; and, second, because according to the terms of the agreement marked Exhibit "A," and offered in evidence by the plaintiffs, the said Quigg was to make up the account and find the *balance from the books*, and that said Quigg instead of doing that, had altered said books, and changed them and made new accounts and additional entries in the same, and had inserted new and additional matter in said *books, and in making up said balance account had included said new and original matter* entered in said books by him, which objections of the said defendants by his counsel, for the reasons aforesaid, the said court then and there overruled and allowed the same to be read to the jury; to which decision of the said court in overruling the said objections of said defendants, the said defendant Hugh Maher, by his counsel, did then and there duly except.

Page 58. The plaintiffs thereupon read to the jury from the books thus introduced in evidence by the plaintiffs and admitted by the court against the objections of the said defendant Hugh Maher, as aforesaid, the said balance account in which was included said new and original matters, and also the Briar Hill and Chippawa coal account, and the account of Crawford, Cross & Co.

Pages 58 to 65 contain the testimony of W. W. Drummond, who testified that in January 1861, the plaintiffs, by Nathan P. Payne, took possession of the coal in pursuance of the agreement dated January 10th, 1861, said Payne, the agent of the plaintiffs, thereafter had the control of all the coal and the business transactions connected with it until the month of September following, that he drew the agreement set out in plaintiffs declaration, that Maher was not present when it was drawn and executed, that he never informed Maher that there was such an agreement until after he was sued upon it, when he denounced it as a swindle.

Pages 67 to 76 contain the testimony of Nathan P. Payne, who testified that Kelly came to the office of plaintiffs in the summer of 1860, to endeavor to make an arrangement for a supply of bituminous coal for Kelly & Co.

The following interrogatory was then put to the witness:

State what was said by Kelly in regard to his connections here, with whom he was connected?

(To which question the said defendant Hugh Mayer, by his counsel, did then and there object on the ground that the conversation between said Kelly and said plaintiffs was afterwards consummated by a written agreement, and that such written agreement was the best evidence; which objection of said defendant the said court then and there overruled; to which decision and ruling of the said court in overruling said objection, the said defendant, by his counsel, did then and there duly except.)

Ans. As I was saying Mr. Kelly, when in the office, talked about purchasing soft coal, bituminous coal, for a supply in their yard here to sell with the anthracite coal, which he had under a contract with Calwallader Bull, of Buffalo. Kelly, in urging the propriety of contracting with them for the coal, stated that he was not very well off himself; he was not responsible for a very large amount.

(The said defendant, Hugh Maher, then and there objected to said answer, and renewed his objection to the further examination of said witness as to the said conversation of the said Kelly with the said plaintiffs at the time aforesaid, for the reason aforesaid; which objection of the said defendant the said court then and there overruled, on the ground that the assumption of the defendant was not admitted to be true, and was not warranted, in fact, so far as yet appeared; to which ruling of the said court in overruling said objection of said defendant, the said defendant, by their counsel, did then and there duly except.)

Page 68. That under an agreement between plaintiffs and defendants, he took possession of the coal fixtures and the yard on the 14th or 16th of January, 1861, and held possession of the same for plaintiffs.

Page 69. That the books were also delivered to him. That a few days after he took possession he met Maher, who told him he hoped he would have good luck in collecting the accounts and selling the coal.

Page 72. That late in the spring of 1861, Maher told Payne that he, (Maher) had dissolved with Kelly and that he would not be responsible for any more contracts that he, (Kelly) should make, that he returned home the latter part of July, and left Cross in the office when he left, and Cross was detained in Chicago a few days in selling the coal.

Page 74. That the firm of Crawford, Cross & Co. was dissolved in April, 1861. That was the end of their year.

Pages 76 to 80 contain the testimony of Flemming. About the first of May, 1861, witness heard Maher tell Payne that the firm of Kelley & Co. was dissolved, and to have the notice of dissolution published immediately.

Pages 80 to 82 contain the testimony of George H. Ford, that he was a partner of Drummond. That he drew a portion of the contract submitting the books to Quigg, and was present when it was executed;

that he heard a conversation between Maher and Cross before the contract was drawn, in which Maher stated that he had turned over the stock and fixtures of the firm of Kelly & Co. to the plaintiffs below in full satisfaction of all claims that they might have against the firm of Kelly & Co. That Cross admitted that he had received them as collateral but wanted a guarantee from Maher; that Maher refused to sign any agreement and said he would not be bound by any agreement signed by Kelly, as the firm had dissolved the May previous; subsequently in the absence of Maher, witness assisted in drawing up the contract set out in the declaration, and the same was signed by Kelly, for Kelly & Co., and by Cross, for Crawford, Cross & Co., in the presence of said Ford with the injunction that it should be kept a secret from said Maher, which he had done until called upon to testify in this case.

Page 82. That the books show that Drmmond collected $1,000 or $1,100, but that he thinks Drummond collected $2,000.

Pages 82 to 83 contain the testimony of Benjamin Halbrook; is a coal dealer in Chicago, that the coal season referred in the original agreement, according to the usages of trade in Chicago, would terminate on the first of May, 1861.

Pages 83 to 85 contain the testimony of Thomas B. King, has been accustomed to keep books 30 years, has examined books of Kelly & Co. and the balance account on the ledger; that the balance account is erroneous, from the fact that some of the balances have been paid and so adjusted on the journal, and not accounted for in the balance account. That several items in Quigg's account are erroneous, that Quigg's name appears in the balance account with an erasure in the book scratched through the paper opposite to it; that the cash account is some eleven hundred dollars short.

Pages 85 and 86 contain further testimony of said Ford; that it was talked over at the time the agreement submitting the account to

Quigg was executed, that the partnership between Maher and Kelly was terminated some months previous.

Page 92. The jury found for the plaintiffs $6,033.49 and say that they find that defendant Maher had ratified the contract of September 13th, 1861.

Pages 92 and 93. April 13th, 1864, motion for new trial overruled and judgement entered for plaintiffs.

Page 93. Appeal, bond.

Page 94. Writ of error. Citation and service.

Pages 93 and 94. Certificate.

SUPREME COURT OF THE UNITED STATES.

HUGH MAHER, AND EDWARD KELLY,
Plaintiffs in Error,
vs.
LEMUEL CRAWFORD, DAVID W. CROSS, AND HENRY B. PAYNE,
Defendants in Error.

IN ERROR
TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PLAINTIFF'S POINTS AND AUTHORITIES.

The first count of the declaration in this case was upon the submission to Quigg and his award under the same. The declaration also contains the common counts. The evidence shows that the coal was

furnished under the contract of August 4th, 1860, under a *del-credere* commission. For coal thus furnished the defendants were not liable upon the common counts.

2d, Saunders Pl. and E., 534 and 545.
Gall vs. Comber, 7 Taunton R, 558,
1st Chitty's, Pl., 346.
Winton vs. Meeker, 25 Conn., R, 456.
Smith vs. McGeher, 14 Ala., 404.

The only evidence in relation to the coal thus furnished, proper for the consideration of the jury, had reference to the submission set out in the first count of the declaration.

I.

The plaintiffs below, in their first count, aver that defendants below had, by a certain contract assigned over to the plaintiffs below, all the accounts in Schedule A, attached to said contract together with other accounts and property, with the agreement that the books of defendants below should be submitted to one George H. Quigg, who should *determine from said books* the balance due from defendants below to plaintiffs below; and that the plaintiffs below should take the accounts thus assigned and *collect* them, and if found more than sufficient to pay the amount thus found by Quigg, they were to pay the balance to the defendants below; and if the *amount thus collected*, should be found not sufficient, the defendants below were to make up the balance, and the plaintiffs below in *said count allege that they did collect said accounts and apply them, &c.*

This contract was offered in evidence by the plaintiffs below without Schedule A, referred to therein. The defendant below, Hugh Maher, objected to the reading of said contract in evidence. 1st. Because

Schedule A, mentioned in said contract was not produced, and because the non-production of said Schedule A, was not in any manner accounted for. 2d. Because said contract was incomplete without said Schedule A. 3d. Because said contract was executed by Kelly, and not by Maher & Kelly, after the firm of Kelly & Co. was dissolved. But the Court below overruled said objection and allowed said contract to be given in evidence to the jury. This we claim was error. The contract without the schedule was incomplete, and did not tend to show the rights between the parties. The rights of the parties under the contract depended upon the accounts assigned. The accounts were to be put into speedy collection as is alleged in the first count of the plaintiffs' declaration, was done, and if more was collected than said Quigg should award, the plaintiffs were to pay the balance to the defendants below; if less the defendants below were to make up the deficiency. The contract without the schedule, which was a list of the accounts assigned, was clearly incomplete, and had no certain meaning.

Dennis vs. Barber, 6, Sug. and Rawle, 425 and 6.
Stewart vs. Preston, 1 Branch 10.
Sewall vs. Henry, 9 Ala., 24.
Adams vs. Hill, 4, shep. 215.
Sloan vs. Ault, 8, Clark (Iowa) 229.
Shields vs. Henry, 31, Ala., 53.
Miller vs. Travers et. al. 8, Bing, 244, (21 Com. Law, 524.)
1, Philips' Evidence 341.
State of Mo., vs. Mix., 15, Missouri, R, 160.
Bank of S. C. vs. Brown, Dudley, Geo. R., 631. 1 Starkie Ev. 413.
Jackson vs. Parkhurst, 4, Wendell's R., 369.

There was in said contract from the absence of said schedule a patent ambiguity which the courts will not allow to be supplied by parol evidence.

Poscoe on Evidence 12.
1 Greenleaf on Evidence, Sec. 300.
Gilson, et. al. vs. Gilson, 16 Vermont, 468.

Said contract was clearly incomplete without said schedule. It was only a part of a contract with the most important part, the subject matter of the contract wanting, and as such was not admissable.

Jackson ex dem Lowell vs. Parkhurst 4, Wendall R, 369
1 Starkie on Ev., 414.

If this contract could have been rendered competent by extrinsic evidence, that evidence should have been first introduced, before the contract was received in evidence.

Miswall vs. Ross, 4 Port. 321.
Lecroy vs. Wiggins, 31 Ala. 13.
Haswell vs. Bussing 10, John R, 128.
Penfield vs. Carpenter 13, John R, 350.
Irvine vs. Cook 15, John 239.
Tuttle vs. Hunt 2, Cowen 436.
Florey vs. Florey 24, Ala. 241.
The State vs. Mix. 15, Missouri 153.
Degraffenried vs. Thomas 14, Ala. 681.
Miller vs. Trovers et. al. 8, Bing 144, (21 Eng., Com. Law, R. 524.)

II.

The evidence shows that the plaintiffs below, through Payne, the son of one of the plaintiffs, who came from Cleveland for the purpose of taking possession of the coal for plaintiffs below, and who received all the money for the plaintiffs, kept the books which were submitted to Quigg by the contract of Sept. 13th, 1861, and from which books, by the terms of said contract, *he was to determine the balance due plaintiffs from defendants as shown by the books at the time they were submitted to him.*

The evidence shows that soon after the date of said contract the books were left with Quigg, and that they remained in his possession for some nine months thereafter. That during all this time Quigg kept accounts in the books. The deposition of said Quigg, and the books as offered at the trial, showed that some forty pages of new and original matter had been entered upon the journal by Quigg after the same had been submitted to him. Among the items entered upon the day-book, and carried through the journal and ledger, and included in the balance found by Quigg, there appear accounts of the sale of coal belonging to the plaintiffs below, which had been sold after the time that the books were submitted to Quigg. Also accounts of a large amount of money that had been collected from the accounts contained in the books submitted to Quigg by Edward Kelly. Also entirely new accounts with Drummond and Ford, to the amount of $1,558.00. Also an account with said Quigg in which he had credited himself some $900.00 for services, and charged himself with various amounts of money that he had collected.

On the 16th day of June, A. D. 1862, the Arbitrator Quigg wrote up a balance of the accounts as the accounts stood on the books at that time. He included in said balance account all of the accounts that had been entered upon the books by him, subsequent to the submission.

In order to establish an award under said contract of submission of Sept. 13th, 1861, the plaintiffs offered the said balance account thus made up by Quigg, and also said books of account containing the same in evidence.

But the defendants below objected to the receipt of the books of account and the said balance sheet in evidence, for the reason that Quigg, instead of finding the balance from the books, as he was authorized by said submission, had changed the books and altered them and introduced new and original matter therein, and in making up said balance sheet had included said new and original matter in the same. But the Court overruled said objection of the defendants below, and

admitted the books and said balance sheet so made up, to go to the jury in evidence. The balance sheet thus made up by Quigg from the books, upon the 16th day of June, 1862, showed a balance on the books at that date, including said accounts entered by Quigg, of $5,473.34. Which amount, with interest, the jury found for the plaintiffs below, saying that they found that defendant Maher had ratified the contract of submission.

We claim that the Court below erred in admitting said books and said balance sheet in evidence for the following reasons:

Under the contract of September 13th, 1861, the parties agreed to submit the books of Kelly & Co., to George H. Quigg, and that he should ascertain the exact amount due the plaintiffs below *from the books of Kelly & Co.*, and that the amount *so found* from the books of Kelly & Co., to be due and owing should be final.

Under said agreement of submission, Quigg was authorized to determine, from the books as they stood at the time of the submission, the balance due plaintiffs below from defendants below, and such balance, so determined by Quigg from the books, would be evidence against the defendants below under said agreement; but Quigg having found a balance from entries not in the books at the time of the submission, and having included in said balance new and original entries, made by himself subsequent to the submission, such balance so made was not authorized by the terms of the submission, and such finding was not evidence against the plaintiffs in error.

The suit was brought upon this contract of submission and the alleged finding of Quigg under the same. The plaintiffs below allege in their declaration that the defendants below promised and agreed to submit the exact amount due from the defendants below to plaintiffs below to the decision of said George H. Quigg, *he to ascertain said amount from the books of defendants below*, and that said Quigg did ascertain from the books the amount due from the defendants below to plaintiffs below and fix said amount at $5,474.34.

The plaintiffs below first read to the jury the deposition of said Quigg.

On page 11 of printed record Quigg says that he took possession of the books under the agreement of September 13th, 1861.

On page 16 of printed record he says that all the entries made in the books bearing date subsequent to July 24th, 1861, were made by him. That he did not consider it his duty to present defendants below with a copy of the balance sheet, from the ledger, that he left a balance sheet upon the ledger for the inspection of all parties, that a portion of the charges and credits were entered upon the ledger by him.

On page 19, of printed record, he says that without reference to the original contract between the parties to furnish coal, the balance found by him would be diminished $1,040.07 less $200.

Pages 22 to 35 of printed record are made up of entries made in the day-book submitted to Quigg, after the books were placed in his hands. These entries show upon their face that many of them were original entries and not authorized by the terms of the submission. He opened a new account with himself, also with Drummond & Ford. It seems by these entries that instead of finding the balance due from defendants below to plaintiffs below, from the books as submitted, that he proceeded to make collections from various parties and appropriated the money thus collected, giving the defendants credit and charging himself upon the books, and in many cases took upon himself the right to compromise and make settlements; allowing parties owing defendants for counter claims set up by them, thus adjudicating the liabilities of parties indebted upon the books.

He finally, (see page 35 of record,) makes a charge of $900.00, for his services under said submission.

On page 27 of printed record are entries from the day-book of sales of coal made subsequent to the submission.

On page 35 of printed record is the following entry made by Quigg.

CHICAGO, 14th June, 1862.

On an examination of the Briar Hill and Chippewa coal acc'ts it is found that said accounts have been charged for labor of handling, &c., an amount equivalent, or very nearly approaching 45c. per ton on the whole amount rec'd, and having been also charged with the freights, &c. Now, if Kelly & Co. are by these articles of agreement obliged to guarantee all sales made of said coal it would appear that the apparent gain on said coal as per ledger, say $2,080.13, is to be divided equally between Crawford, Cross & Co. and Kelly & Co's profit and loss account, and the coal accounts closed accordingly, viz:

To Cr. of Crawford, Cross & Co.....$1,040.07
Cr. of profit and loss account..... 1,040.06

$2,080.13

Thus crediting plaintiffs below with $1,040.07 from his construction of a contract not submitted to him. And also the following entry:

Charge expense account to the credit of G. H. Quigg,
for services from 16th Sept., '61, up to this date,
both inclusive, at the rate of $100 per month....$900.00

The journal included the same additional entries as those made in the day-book. The ledger contained the balance account which was given in evidence as the award of said Quigg, and upon which the jury found their verdict in this case, which was a general balance of the accounts on the 16th day of June, 1862, as the accounts stood at that date, *including all of said original entries* entered by Quigg on said books.

The entire account of Quigg and also the entire account of Drummond and Ford were entered by Quigg and figured into the balance without authority under the submission, besides the entry of $1,040.07 above referred to, entered June 14, 1862, and charged to defendants below without authority under the submission, and other original entries copied into the bill of exceptions.

When the books were offered containing the balances found by Quigg, made up in a large part from such original matter not submitted to Quigg under said agreement of Sept. 13th, 1861, the defendant Maher objected to the receipt of said books containing said original entries and also to the receipt of said balance account made therefrom, as the finding of Quigg, as evidence under said agreement. For the reason that said Quigg had altered said books and charged them and entered new and original matter therein. And also for the reason that said Quigg in making up said balance account had included said new and original matter in said balance account which he was not authorized to do by said agreement.

But the court overruled said objections and allowed said books to be received, and said balance account to be read in evidence to the jury, and we assign the decision of the court in overruling said objections for error.

First. An award not in pursuance of the submission, or based upon matters not submitted, is void.

In the case of McBride et. al. vs. Hagan et. al. (1 Wendells R. 326) the plaintiffs and defendants had submitted to arbitrators whether a purchase made by defendants, of 1100 bales of cotton, was or was not warranted by instructions from plaintiffs, and if the purchase was not warranted by the instructions then, whether the plaintiffs had sustained any and what damages thereby. The arbitrators decided that the purchase of the cotton was not warranted by the instructions, and that the same be taken to the account of the defendants, and that the plaintiffs had not sustained any damage by reason of the unwarranted purchase

of the same, in as much as by the same remaining for account of the defendants, the damage or loss, if any, thereon, would be sustained by the defendants.

This submission and award was offerred in evidence, and upon objection was rejected by the court, and exception taken.

The Supreme Court (page 340 same case) say that the arbitrators exceeded their authority in passing upon the title to the property, and that the award was void, and that the court below ruled correctly in rejecting it as evidence.

So in the case before the court, the defendants below objected to the award or finding of Quigg as evidence, because he had exceeded his authority and had included in his award, matters not submitted to him, and was therefore void and not evidence in the case, and the court below should have sustained the objection.

In the case of George vs. Lousley (8th East. R. 13) where arbitrators had, among other things, awarded the payment of 94 £ for their services, the court held, as to this matter, that they had exceeded their authority, and set it aside.

So in the case before the court, the books offered showed upon their face that Quigg had charged upon the same the sum of $900, for his services, which sum was carried through the books and included in the balance found by him against the defendants below. This was unauthorized by the terms of the submission, and having found a gross sum his award was void for excess of jurisdiction, see also Hardee vs. Cox, (Willis 92.)

In the case of Leggo vs. Young (81 Eng. Com. Law, R. 626) where matters in suit pending, were submitted to an arbitrator, without mention of costs, it was held that the arbitrator was unauthorized to arbitrate as to costs. See also case of Whitehead vs. Firth (12 East's R. 165.)

In the case of Fisher vs. Pimbley (11 East's R. 188) where matters in difference between plaintiff and defendant were submitted to arbitrators, they awarded that defendant should pay plaintiff 134 £ for coals taken from lands of plaintiff and others, and that plaintiff should give a bond to indemnify defendant against the others, the award was held bad because the arbitrators had arbitrated upon matters not submitted to them.

In the case of Shearer vs. Handy et. al. (22 Pickerings R. 417,) upon reference of all unsettled accounts to arbitrators they awarded that all the personal property owned between them should be equally divided, and the debts should be paid jointly by the parties to the reference, and that one should pay the other $250. Held that the arbitrators exceeded their authority and that the award was void. See McCormick vs. Gray, (13 Howard's R. 27.)

Second. Where it is not apparent from the award that the arbitrator has exceeded his authority, it may be shown by evidence *aliunde* that the arbitrator has gone outside of the submission, and has included in his award matters not submitted, and in such case the award will be rejected as evidence.

In the case of Butler vs. the Mayor &c. of New York, 7 Hill's R. 329, it was provided in a building contract that in case of disagreement arising from any alteration in the form, proportion, or construction of the building or work, the matter should be submitted to arbitrators, to decide the amount of increase or diminution in price. Upon submission the arbitrators decided that the builder should receive $2,385.29 for the increased cost of the said building, after he should have filled up the outside paved way. The action was debt for the balance due on the original contract.

The defendant offered the award in evidence, which was objected to, for the reason, among others, that the arbitrators had exceeded their authority. The court overruled the objection and allowed the award to be read in evidence. The plaintiff offered parol evidence, to show

that the arbitrators had allowed the defendants for defects in the work other and distinct from extra work, which evidence was excluded by the court. Upon error the judgment was reversed, the court holding that parol evidence might be introduced to show that the arbitrators had exceeded their jurisdiction, and that when it should appear, from such evidence, that the arbitrators had exceeded their authority, the award would be void for excess of jurisdiction and not competent evidence.

Third. Where an arbitrator has included in his award matters not submitted to him, and has awarded a gross sum, his whole award is void.

In the case of Thrasher vs. Haynes Jun., (2 New Hampshire R. 429,) the arbitrators included in their award a note not submitted, and awarded a gross sum for plaintiff. The court held that when matters not submitted are considered by arbitrators, and a gross sum is awarded the whole award is void, and in as much as a gross sum was awarded, founded in part upon matters not submitted, they held that the plaintiff could not recover. The court cited the following authorities to sustain the rule: (12 Mod. Rep. 587. Lee vs. Elkins; 2 Wilson 268. Fox vs. Smith; Ceo. James 663; 8 East, 450; 7 East, 85; 14 John's 108; 13, John 268.)

So in the case before the court Quigg based his finding in part upon matters not submitted to him, and included in the same $1,040.07 which he charged the defendants below, from his construction of a contract not submitted to him, and $900 for his services while acting under the submission, and numerous other items copied into the bill of exceptions, which he included in the balance found by him without authority, and found a gross sum against the defendants below. The balance thus found by him made up in a large part of matter not submitted to him, was not evidence against the defendants, and should have been rejected by the court below.

In the matter of Williams, (4 Denio's R. on page 200) the court say that the arbitrators exceeded their authority in charging Goodrich with the debts of the Glendale company, and as the arbitrators had included in their award debts which Goodrich had not contracted to pay, with those he had contracted to pay, and the whole was awarded as one gross sum, the whole award must fail, the court passing their opinion upon the case of Thrasher vs. Haynes (2 New Hampshire R. 429) Supra.

In Tomlin vs. Fordwick (31 Eng. Com. Law, 559) the defendant agreed to grant and the plaintiff to take a lease. They covenanted that the conditions should be named by an arbitrator and his award should be final. The arbitrator decided, among other things, that the defendant should put the premises in tenantable order, to the satisfaction of a third party.

The court held that the arbitrator exceeded his authority in this particular, which rendered the whole award bad.

In Hayward vs. Phillips (33 Eng. Com. Law, R. 21) where a verdict was entered and the matter submitted to arbitrators. They awarded that a verdict should be entered for a larger sum than the first verdict. The court held that the award was bad, as to the entire amount found.

In Harris vs. Curnow (13 Eng. Com. Law, R. 803,) was a submission of all matters touching a road way. The arbitrators awarded that one road way should be vacated and another should be occupied, and that defendant should pay 17 £ 10s. The court held that the award was bad, as to the new roadway, and being bad in part, the whole award was void.

The doctrine laid down in 3 Saunders R. 292, Pope vs. Brett, and the cases cited in the notes, is that where the award is uncertain, or based upon matter not submitted, it is void, and if the award is of two distinct things, one of which is void for uncertainty, or because the arbitrators have exceeded their authority as to that part and the other

is certain and within the submission, the court will reject the void part and enforce the other part, but when the award is of one distinct thing or of a sum in gross, and it appears that the award, in part, is based upon matter outside of the submission, that the court will reject the whole award.

Fourth. An award void for any of the foregoing reasons, is not competent evidence, and it would be error to receive such an award in evidence against objection.

In Culver vs. Ashley (17 Pickering's R. 98) an award was offered as evidence, to the receipt of which, objection was made, because the arbitrators had exceeded their authority, but the objection was overruled and exception taken and the judgment reversed, because the objection was not sustained.

In Brown vs. Hankerson (3 Cowens R. 70) an award was offered and received in evidence against the objection of defendant below, on error the court held the award bad, and that the objection should have been sustained, and reversed the judgment. See also Butler vs. the Mayor &c., of New York. (7 Hill 328 supra.

III.

The plaintiffs having established by proof, that they had, at Cleveland, on the fourth day of August, A. D., 1860, entered into a contract with the defendants to supply them with coal, (see page 21, printed record,) and that Kelly had come to Cleveland for the purpose of making this contract, (see page 67, printed record,) were allowed to introduce in evidence, against the objections of the defendants, the negotiations that preceded the contract, and which were afterwards consummated by said written agreement of August 4th, 1860. This we

claim was error. For all negotiations which preceeded the execution of said written agreement, are to be regarded as merged in it, and such written agreement was the best evidence.

2 Cowen & Hills Notes to Phillips Evidence, p[illegible] 2nd, page 594
Gardner Manufacturing Co. vs. Heald, 5 Greer
Austin vs. Sawyer, 9 Cowen 39.
Bond vs. Haas, 2 Dall. 133.

is certain and within the submission, the court will reject the void part and enforce the other part, but when the award is of one distinct thing or of a sum in gross, and it appears that the award, in part, is based upon matter outside of the submission, that the court will reject the whole award.

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Gardner Manufacturing Co. vs. Heald, 5 Greenl. Rep. 381.
Austin vs. Sawyer, 9 Cowen 39.
Bond vs. Haas, 2 Dall. 133.

D. C. Nichols
Atty for Plffs
in error

REPLY TO DEFENDANTS' POINTS.

This was not a suit to recover the price and value of a quantity of bituminous coal, as alleged by defendants in error, but was an action of assumpsit to recover the amount of an alleged award.

On page 6 of the defendants' brief, it is alleged that Quigg proceeded under the direction of Drummond and Ford, and Hugh Maher to correct and determine from the account books of Kelly & Co. the amount due to Crawford, Cross & Co.

It will be seen from Quigg's deposition that he did not proceed under the direction of any one, and there is no evidence showing that Quigg was authorized to go outside of the books by plaintiffs in error, and it will also be seen from his deposition that the balance found by him was not determined from the books as submitted, but in a large part from entries of original matter made by him subsequent to the date of the submission. (See answers to 8th and 26th direct interrogatories and answers 7th, 8th, 12th, 14th, 25th, 26th, 30th and 31st cross interrogatories.) It is not admitted that substantial justice was done the plaintiffs in error, as is alleged on the 8th page of defendants' brief, but on the contrary, it is claimed that neither the original agreement as offered without Schedule A, which was a part thereof, nor the books which had been altered and changed by Quigg, nor the alleged balance found by him, which was made up in a large part from matter not submitted to him, were competent evidence, and should have been rejected by the court below; and if they had been so rejected, that under the pleadings and evidence in the case, no recovery could have been had in the court below.

It was not justice to the plaintiffs in error to have in the court below admitted in evidence against them the agreement of September 13, 1861, without the production of Schedule "A," the list of accounts which was attached thereto, and which the defendants in error alleged in their declaration they had put into speedy collection.

Neither was justice done the plaintiffs in error in the admission of the alleged award of Quigg in evidence. Quigg's deposition shows that sixteen or seventeen hundred dollars were collected by Drummond, Ford & Quigg after the submission and before the 16th day of June, 1862, the date of the award, and he had credited the plaintiffs in error only two hundred dollars on account of such collections. (See answer to 8th cross interrogatory, page 15 of record;) and the amount was increased $1,040 by his construction of a contract which was not submitted to him.

The award did not show the correct state of the accounts on the 16th day of June, 1862, the date the balance offered was written up. But the evidence shows it was too large by about $2,500. And it was not an award under the submission, because it contained matter not submitted to Quigg.

The first point of defendants' printed argument is that Maher consented to, or confirmed, the agreement of September 13, 1861, and pages from 9 to 17 of defendants' brief are devoted to a review of the evidence upon this question. Although there is no evidence in the case to show that Maher was in any manner informed of the existence of said agreement until after he was sued upon the same, and although there is evidence in the case to show that at the time the contract was drawn and executed that it was arranged that this contract should be kept from the knowledge of Maher, yet this matter was a question for the jury and will not probably be reviewed by this court.

The second point of the defendants in error is, "Did George H. "Quigg, *in pursuance of the agreement of September* 13, 1861, ascer- "tain the amount due from Kelly & Co. to Crawford, Cross & Co. ?"

They say: "By reference to the agreement it will be seen that "the exact matter referred to and to be determined by Mr. Quigg was "the amount due from Kelly & Co. to Crawford, Cross & Co., and "that the *means wherefrom the fact was to be ascertained was the "books of Kelly & Co.*, and that therefore the question is, 'did Mr. "Quigg proceed in *accordance with the power* in arriving at the award "which he gave?'"

The defendants in error claim that it is a question of fact whether Quigg exceeded his authority.

The balance found by Quigg and offered by the defendants in error as the award of Quigg does not purport to be a *balance of the books to September* 13, 1861, which was the *question submitted to Quigg.* And Quigg does not testify that this balance was his award under the agreement. Quigg was to determine the balance from the entries in the books on the 13th September, 1861, the time they were submitted to him.

The plaintiffs in error do contend, as the defendants in error say on the 19th page of their printed brief, "that Quigg, in arriving at the "balance" offered, "exceeded his authority, for the reason that if a "balance had been struck from the books of Kelly & Co., as they "stood at the time Quigg took hold of them, it would have been much "less," and that Quigg, under the agreement, had not the right to make entries of matters existing between the parties not submitted to him, for such right would be equivalent to a general submission of all matters between the parties.

If the entries upon the books of Kelly & Co., on the 13th of September, 1861, would not show the balance offered by the defendants in error, as Quigg swears, in his answer to the 7th cross-interrogatory, such balance would not be an award of Quigg under the submission. The books were kept by the son of one of the defendants in error, and probably the defendants in error knew as much about the entries in the books as the plaintiffs in error.

But whether they did or not, Quigg was not authorized by the agreement, as claimed by defendants in error on the 20th page of their brief "to make all proper and necessary entries therein, to a just and "fair settlement between the parties," for such authority would be equivalent to a general submission.

Quigg was to find the balance from the books of Kelly & Co., as submitted, and from no other source, and there is no evidence tending to show that Maher, or any other person, consented that he should find a balance in any other manner; and the fact that Quigg, in making collections, found offsets against Kelly, or Maher, which Maher allowed to be correct, would not show such authority. Neither would the fact that Maher urged upon Quigg to be diligent in making collections, and to retain enough to pay his salary, tend to show that Maher authorized Quigg to go outside of the submission in making his award, although, perhaps, the testimony might show that Maher supposed that Quigg had possession of the books for the purpose of making collections. The $1,600 or $1,700 referred to on the 23d page of defendants' brief, should have been wholly, and not as was done by Quigg, in part, credited to the plaintiffs in error, if a correct statement of the accounts had been made on the 16th day of June, 1862. But this entire matter was outside of the submission to Quigg.

Did Quigg determine the exact amount due from Kelly & Co. to Crawford, Cross & Co., from the books as submitted. If he did not, the balance of the books as offered was no award under the submission, and was void, and should have been rejected by the court below.

The balance offered does not purport to be a balance of the books to September 13, 1861, but it purports to be a balance of the books to June 16, 1862.

In the case of Shaw *vs.* Atkinson *et al.*, 3d Yeates' Reports, Pa.,

page 48, an action of replevin was brought December Term, 1798, for goods distrained for rent. All matters at variance between the parties were referred to arbitrators. They awarded the sum of $1,000 to be due defendants upon a balance of all accounts to July 1, 1800. Upon objection made, the Court set aside the award, holding that the arbitrators had clearly exceeded their authority, which was confined to December 11, 1798, the time the distress was made.

So in the case before the court, it was submitted to Quigg to determine from the books the balance of the accounts therein contained between the parties to September 13, 1861. The plaintiffs below offered a balance found by Quigg to June 16, 1862, which was admitted by the court as evidence of his award under the submission against the objections of defendants below. Quigg's own deposition shows that the balance found by him was not made from the books as submitted, or from the original entries in the books at the time they were submitted, but that such balance was made in a large part from matters outside of the books not submitted to him. (See his answers to 8th and 26th direct intorrogatories, and his answers to 7th, 8th, 12th, 14th. 25th, 26th, 30th and 31st cross-interrogatories.) Exhibit B annexed to his deposition, as the balance found by him referred to in his deposition, was not read to the jury upon the trial of the case. But the books, showing a balance, and the entries from which it was determined, and that it was made in a large part from matters not submitted to him, were read to the jury against the objection of defendants below.

In answer to 29th cross-interrogatory, Quigg says Payne kept the books till the middle of July, 1861. In answer to 12th cross-interrogatory, he says, that all the entries bearing date subsequent to July 24th, 1861, were entered by him, and he had previously stated that he took possession of the books under the agreement of 13th of September, 1861.

The entries in the books copied into the bill of exceptions, from

page 22 to page 57 of printed record, show that Quigg wholly failed to follow the agreement of submission, but after the books were submitted to him made numerous original entries therein of matters not submitted to him, and the balance found by him purports, upon its face, to be a balance of the books upon the 16th of July, 1862, including items of original entries made by Quigg subsequent to said submission.

In the case of McNear *vs.* Bailey, 18 Maine R., 251, the arbitrators failed to pass upon all matters submitted. The court say it will be presumed that they passed upon all matters presented, but that parol evidence may be introduced to show that matters within the submission were presented which were not passed upon, and that when it so appears the award is void. It appearing from parol evidence that the arbitrators had not passed upon all matters submitted and presented, the court below directed a non-suit to be entered, which on appeal was confirmed. The court passed upon the question from parol evidence, whether all matters presented within the submission had been passed upon by the arbitrators. It was not submitted as a question of fact for the jury.

So in the case before the court, when it appeared from parol evidence that Quigg had passed upon matters not submitted, and based his finding upon the same, the court should have decided as to the validity of the award, and if void, rejected the same as evidence. The plaintiffs in error claim that the judgment of the court below should be reversed.

First—Because the contract of September 13th, 1861, was admitted in evidence by the court below, against the objections of defendants below, without the production of schedule A, which was a part thereof, and because the absence of said schedule was not in any way accounted for, and because said contract without said schedule was incomplete, and because from the absence of said schedule there was a patent ambiguity in the meaning of said contract.

Second—Because the court below allowed the balance found by Quigg, which purported to be a balance of the books to June 16, 1862, to be read to the jury as the award of Quigg under the agreement of September 13, 1861, against the objections of defendants below, said balance not purporting to be a balance of the books to September 13, 1861, and when it appeared from said balance and said books, and the deposition of said Quigg, that said balance was made up in a large part from original entries made by Quigg, and of matters not submitted to him, and in allowing the books of account of Kelly & Co. to be read in evidence to the jury against the objections of the defendants below when it appeared from the books themselves, and also from the deposition of Quigg, that Quigg had altered the books, and changed them, and entered new and original matter therein not submitted to him after the books were submitted.

Third—Because the court below allowed the defendants in error to show by parol evidence against the objections of plaintiffs in error the negotiations which resulted in the contract of August 4, 1860.

D. C. Nicholas
Atty for Plffs
in error

Supreme Court of the United States.

(No. 198.).

EDWARD KELLY and HUGH MAHER, Plaintiffs in Error.
v.
LEMUEL CRAWFORD, DAVID M. CROSS, and HENRY B. FAHIE, Defendants in Error.

ARGUMENT OF MONROE & M'KINNON

For Defendants in Error.

Smith & Hayward, 14 S. Clark Street.

IN THE

Supreme Court of the United States.

(No. 198.)

EDWARD KELLY AND HUGH MAHER,
Plaintiff's in Error.

v.

LEMUEL CRAWFORD, DAVID M. CROSS AND HENRY B. PAYNE,
Defendants in Error.

Error to the Circuit Court of the U. S. for Northern Dist. of Illinois.

ARGUMENT OF MONROE & M'KINNON

For Defendants in Error.

CHICAGO:
BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK STREET.
1865.

STATEMENT.

This is an action of assumpsit, wherein the defendants in error recovered a judgment against the plaintiffs in error for the price and value of a quantity of bituminous coal.

The facts, as will appear from the record, may be thus briefly stated.

In the year 1860 the defendants in error, under the name and style of Crawford, Cross & Co., were coal dealers in the city of Cleveland, Ohio, and at the same time the plaintiffs in error, under the name and style of Kelly & Co., were engaged in the coal business at the city of Chicago.

On the 4th day of August, 1860, Kelly, being in Cleveland, made a contract on behalf of his firm with Crawford, Cross & Co., to following effect:

Crawford, Cross & Co. were to supply, at the lowest cash price, and deliver to Kelly & Co. on board of vessels, at Cleveland, bituminous coal, of the varieties usually found in the Cleveland markets, sufficient to stock the coal yard of Kelly & Co. in Chicago.

Kelly & Co. were to advance the freight and insurance thereon, furnish the yard, dock and sell the coal, keep, and render weekly, accurate accounts of receipts and sales, *and guarantee the payment of all bills of account for sales, without charge*, except the actual cost of docking and delivering to customers, which in no case was to exceed *forty-five cents* per ton.

Out of the aggregate sales of each week there was to be deducted and remitted, with the account of sales to Crawford, Cross & Co., the amount due them for the cost price of the coal sold, Kelly & Co. were to retain the amount due them for freight and insurance, and the remainder was to be divided equally between the parties.

The coal was to remain the property of Crawford, Cross & Co. until sold and delivered, and Kelly & Co. were to deal in no other bituminous coal, unless Crawford, Cross & Co. failed, after reasonable notice, to furnish a supply to them, as provided in the contract.

Annexed to this contract is the following schedule of prices :

N. B.—It is understood that the present prices of coal delivered on vessels at Cleveland are :

For Briar Hill	$3.00 ℔ ton.
For Chippewa	2.60 ℔ ton.
For Mineral Ridge	2.85 ℔ ton.
For Pittsburg	3.50 ℔ ton.
For Massillon	2.65 ℔ ton.
For Slack	1.38 ℔ ton.
For Nut	1.75 ℔ ton.
For Mixed	1.60 ℔ ton.

On the 10th of January, 1861, a memorandum was added to the contract, which provided that *it was not to be a partnership of any kind whatever between the parties*, and that all the coal furnished was to be and remain the individual property of Crawford, Cross & Co. until it was sold.

This memorandum, or addition, also contained a clause that, from and after the 15th of January, 1861, Crawford, Cross & Co. were to furnish Kelly & Co. with a competent book-keeper, and that Kelly & Co. were to pay $25 per month of his salary during, the time he was in their employ.

This book-keeper was to be considered in the actual possession of the coal for Crawford, Cross & Co.

In compliance with this addition to the contract, Crawford, Cross & Co. sent Mr. Nathan D. Payne as book-keeper to Kelly & Co.

The necessity for thus placing the unsold coal in the possession of a third party, grew out of the fact that it had been seized on execution against Kelly & Co., and Crawford, Cross & Co. were obliged to replevin it. See Rec. p. 59.

In pursuance of the contract thus made, Crawford, Cross & Co. sold and delivered to Kelly & Co. about 4000 tons of Briar Hill and Chippewa coal.

On the 13th of September, 1861, there being a large sum of money due Crawford, Cross & Co., for coal furnished Kelly & Co. under the contract, the following agreement was made and entered into.

" Know all men by these presents, that whereas Kelly & Co., of Chicago, Illinois, *are justly indebted* to Crawford, Cross & Co., of Cleveland, Ohio, in the sum of *from four to six thousand dollars upon joint account, the exact amount to be ascertained from the books of Kelly & Co., by one George H. Quigg, under the supervision of the parties to this agreement*, and that the amount so found to be due and owing *to be final*; and in consideration of such indebtedness, and the further consideration that said Crawford, Cross & Co. agree not to sue said Kelly & Co. upon such indebtedness before the 13th day of June, A. D. 1862, unless one of the firm of said Kelly & Co. shall remove out of this State, we (the said Kelly & Co.) do hereby grant, bargain and sell, assign, transfer and set over, unto the said Crawford, Cross & Co. all the accounts hereunto attached, and marked Exhibit " A," together with two wheelbarrow scales, one six-tons Duryea & Forsyth's scale, three coal carts, four coal screens, one office desk, and all other accounts due and owing to said Kelly & Co., upon their coal books, except the accounts now enjoined in chancery, which said chancery suit is now pending. It is further agreed by the parties hereto that the said Crawford, Cross & Co. are to put the said accounts, and each of them, into speedy collection, and use all reasonable due diligence to collect the amounts found to be due on each and all of said accounts, as far as the same can be done; and after paying the expenses of col-

lecting said moneys, the balance so collected shall be applied to the extinguishment of the indebtedness of said Kelly & Co. to Crawford, Cross & Co., as ascertained by the aforesaid George H. Quigg. *It being distinctly understood that the said Quigg is to ascertain the amount due,* to which the parties hereto now agree is to be the actual amount, and the sum so intended to be secured by the sale and transfer of the accounts and property herein mentioned. Should there be any balance left after collecting the sums herein referred to, the said Crawford, Cross & Co. agree to pay the same, by their agents or attorneys, over to Kelly & Co., and should the said sum of accounts, and the personal property herein referred to, be insufficient to pay the sum found (hereafter) to be due to Crawford, Cross & Co., then, and in that case, the said Kelly & Co. agree to pay the balance remaining unpaid to the said Crawford, Cross & Co. It is further agreed by the parties hereto, that Messrs. Drummond & Ford, attorneys, of Chicago, are to superintend the collection of said accounts, and the sale of the personal property hereby and herein transferred to the said Crawford, Cross & Co., and for such purpose are to have the control of said books of said Kelly & Co., and the said accounts, for which services they are to receive the usual rate of per cent. for collections, and the usual fees in case of litigated suits.

In witness whereof, we hereunto set our hands (as also to a duplicate), this 13th day of September, A. D. 1861, at Chicago, Illinois.

CRAWFORD, CROSS & CO.
KELLY & CO.

About the middle of September, 1861, pursuant to this agreement, Mr. Geo. H. Quigg, under the direction of Messrs. Drummond & Ford and the defendant Hugh Maher, proceeded to correct and determine from the account books of Kelly & Co., the amount due Crawford, Cross & Co., and in the month of June, 1862, reported the same to be $5,474.34.

(See Mr. Quigg's answer to Int. 10, printed Rec., p. 11.)

The plaintiffs in error having failed to pay the amount thus found against them by Mr. Quigg, Crawford, Cross & Co., on the 18th of September, 1862, brought this suit in the court below.

The declaration consists of one special count on the agreement, and the award of Mr. Quigg, thereunder, with the common counts, for money paid, money had and received, and an account stated. See printed Rec., pp. 3, 4, 5.

To this declaration the plaintiff in error, Hugh Maher, filed three pleas.

1st. General issue.

2d. That he did not execute the agreement set out in first count of plaintiffs declaration.

3d. That the agreement set out in plaintiffs declaration was executed by Edward Kelly, in the name of Kelly & Co., *without his knowledge or consent*, and that long before the date thereof, the firm of Kelly & Co., of which he had been a member, was dissolved.

On the 2d of July, 1863, a stipulation was entered into between the parties to the effect that the defendant Hugh Mahar, on the trial of the case, might intoduce and give in evidence, under the general issue, any, and all, testimony he would have the right to introduce, to sustain any defence he had to the case.

On the 26th of March, 1851, upon this state of facts, the case came on to be heard before a jury who, after hearing the testimony and arguments of counsel, and receiving full instructions from the court, rendered a verdict in favor of Crawford, Cross & Co. for the sum of $6,033.49.

A motion for a new trial was then made and argued, and the Judge before whom the case was tried, and who had the fullest opportunity of hearing and considering the facts, as well as judging of the witnesses, not only refused to disturb the verdict, but gave judgment thereon.

This judgment the court is now asked to reverse, not because of any injustice done the defendants, or that the judgment and finding of the jury are not fully supported by the pleadings and proofs in the case, or that the jury were in any wise misled by the direction of the court, or would not be justifiable in coming to the same conclusion under any aspect of the case consistent with the facts, or that substantial justice has not been done to the defendant; nothing of the kind is assigned for error. On the contrary, and if we may judge from the position assumed by the learned counsel, who argued the motion for new trial, there being no errors assigned in this court, the plaintiffs in error substantially admit that the defendants in error made out their case; but say the court technically erred in permitting the defendants in error to introduce and read in evidence to the jury, the contract of September 13th, 1861, and the books of Kelly & Co., and in over-ruling the several objections made on behalf of the defendant Hugh Maher.

BRIEF AND POINTS.

The general question, therefore, is: Do the facts of this case warrant the finding of the jury? This is really the only, as well as the identical, question which, in over-ruling the motion for new trial, was passed upon and determined in the affirmative by the court.

By that decision, and the verdict of the jury, we stand.

In this view of the case *two questions of fact* are presented for the determination of the court.

1st. Did Hugh Maher consent to, or confirm, the agreement of Sept. 13th, 1861.

2d. Did George H. Quigg, in pursuance of that agreement, ascertain the amount due from Kelly & Co. to Crawford, Cross & Co.

These questions, already passed upon by the jury and the court before whom the case was tried, would now seem to admit of no other than an affirmative answer; but being controverted in the particular case, we invoke the patience, as well as attention, of the court in their discussion.

They will be considered in order.

I.

Did Hugh Maher consent to, or confirm, the agreement of September 13, 1861.

To establish this proposition needs only a reference to the testimony.

Mr. Geo. H. Quigg, whose duty it was, in pursuance of this identical agreement, to act as referee in the matters of dispute between the parties, and who was examined as a witness in the case, in the course of his examination, testifies as follows:

"My name is Geo. H. Quigg. My age is about fifty-
"eight years. My occupation is that of an accountant or
"book-keeper. I reside in Chicago. I know all the par-
"ties to this suit except Mr. Payne."

He is then asked:

"By whom was the paper marked Exhibit 'A', attach-
"ed hereto, first shown to you, and are you the same Geo.
"H. Quigg mentioned therein?"

His answer is: "This is either a copy or the original of
"a paper first shown me by Mr. Drummond. I have seen
"the hand-writing of Cross, of Crawford, Cross & Co., and
"think this is signed by Mr. Cross. The signature of
"Keily & Co. is by Edward Kelly. I have seen both
"Kelly and Cross write."

He is next asked what, if anything, he did under that agreement; and to this answers:

"Mr. Kelly went, and gave me charge of the office and "*a portion* of the books. *Mr. Maher brought me the re-* "*mainder of the books, such as I required*, and I went on "to examine and correct the books, and find the proper "balances." See printed Rec., pp. 10, 11.

Notwithstanding this testimony, the counsel for plaintiffs in error contend that Mr. Hugh Maher not only did not consent to this agreement, but that he was wholly ignorant of its existence until the 28th day of May, 1862, and that then he repudiated it.

It is obvious, however, that it would require more than ordinary ingenuity to reconcile this extraordinary assumption with Mr. Quigg's answer to the last interrogatory:

"Mr. Kelly went, and gave me charge of the office and "*a portion* of the books. *Mr. Maher brought me the re-* "*mainder of the books, such as I required*, and I went on "to examine and correct the books, and find the proper "balances."

It would certainly be a very remarkable phenomena of nature, if true, that Mr. Maher should thus, *intuitively*, as it were, immediately after the making of this agreement, bring these identical books of account to Mr. Quigg, wherefrom he was to ascertain the very fact which the agreement submitted to his determination.

But, strange as it may seem, this would-be extraordinary freak of nature, which thus exhibited itself in the conduct of Mr. Maher on the occasion referred to, ended not with Mr. Maher bringing to Mr. Quigg the very books which he *required*; for we find, upon looking into the record, that on many subsequent occasions, his mind—that invisible index of human motives—was very much annoyed about the progress which Mr. Quigg was making towards balancing the books, detecting errors, and collecting sufficient of the

debts, wherewith to pay for his own services, as well as the valuable services of Drummond & Ford.

Thus Mr. Quigg, on being further interrogated gives the following testimony:

Int. 12. "How long after the agreement was shown "you by Mr. Drummond, before *Mr. Maher got and de-* "*livered to you the books you speak of?*"

Ans. "Perhaps the first or second day. I could not "say positively which."

Int. 13. "How often did you see Mr. Maher while you "were to work at the books?"

Ans. "Quite frequently; but could not say the number "of times."

Int. 14. "*With whom of the parties to this suit did you* "*most frequently consult, with regard to your work upon* "*the books of Kelly & Co.*, and how often did such con- "sultations occur?"

Ans. "*With a few exceptions, Mr. Maher was the only* "*person with whom I consulted.* Occasionally I had an "interview with Kelly; but not often. I hardly know "how to understand the meaning of the word "consult" "in this connection. I did not have consultations, *but* "*Maher would come frequently and inquire how I pro-* "*gressed in collecting, making up accounts, and finding* "*errors, and different things.* Kelly rarely came there, "unless I went for him. I rarely saw any body else ex- "cept Drummond, who acted as agent for the parties."

Int. 15. "What directions, or suggestions, if you re- "member any, did Mr. Maher give, or make, in regard to "the books or accounts?"

Ans. "*In regard to the accounts*, Mr. Maher told me *to* "*be very particular*, and make memoranda of all mistakes "I should find. As to collections, he repeated the words, "to use all diligence, *so as to have sufficient to pay for my*

" *services and Drummond & Ford's commissions*, and to " urge on Drummond & Ford *to retain sufficient in their* " *hands for that purpose.*"

Int. 16. " Was Mr. Maher cognizant, from time to " time, of what you were doing with the books, and have " you found the different accounts ?"

Ans. " *Mr. Maher knew when he was there, in the office,* " I was progressing with the books, but probably knew " little about the condition of things *until* the balance was " made."

Int. 18. " What interest, if any, did he appear to take " in your labor ?"

Ans. " He appeared to be the *leading man* who wished " to have the books settled up."

Int. 18. " What did he say or do which led you to " think he took particular interest in the matter ?"

Ans. " *His frequent visits to the office, and inquiries* " *how we were getting along, and what errors were found,* " *&c.* The errors were generally exhibited to him when " they were found, and when he came."

Int. 22. " Did you have any conversation with any of " the parties to the agreement marked Exhibit " A," con- " cerning your examination of the books of Kelly & Co ?',

Ans. " I have had but little conversation with any of " the parties, *about the agreement. As to the examination* " *of the books, I have had a great deal of conversation with* " *Mr. Maher*, and considerable with Mr. Kelly, and but " little with Crawford, Cross & Co., because I did not see " them until the books were nearly brought up. Kelly " told me at one time that Maher did not want me to " bring up the books, but wanted some one else to do so. " *I spoke to Maher about it, and he said he never objected* " *to my bringing up the books.*"

Int. 23. "During the time you were at work on the "books of Kelly & Co., did Maher make any requests of "you, in regard to your work?"

Ans. "*He repeatedly told me to be careful and find out "all the errors, and to make memorandums of them, and "to attend to making all the collections possible, by suit or "otherwise, so as to have money enough to pay my salary, "and the commissions of lawyers for collecting the same.*" See printed Rec. pp. 11, 12.

To contend, in the face of this positive, uncontradicted testimony, that Mr. Maher was ignorant of, or that he did not consent to, or confirm, the agreement of Sept. 13th, 1861, would be such a manifest attempt to stultify one's own good sense, that no court would for a moment permit the attempt.

There are some things which, of themselves, are so obvious, that no logic or reasoning can make them plainer. Like axioms, they are self-evident propositions. So it may be said of the knowledge and relation of Mr. Maher in regard to the employment and duties of Mr. Quigg, when tested by his conduct and his acts; which unmistakeably say, he knew all about it. He consented to the agreement —acted and gave Mr. Quigg instructions under it.

It is true, the witness W. W. Drummond, in his deposition read on the trial, says: "The agreement referred to "was made by Kelly, in the name of Kelly & Co., after "the dissolution of that firm, and *without the knowledge "or consent of Mr. Maher, who always repudiated and "denounced it as a swindle.*" See Rec., pp. 59, 62.

But unfortunately for the reputation of this witness, *he stands impeached by himself.*

"Out of thine own mouth will I judge thee, *thou* wicked servant!"

In a letter written by this witness to the defendant D. W. Cross, on the 23d of September, 1861, ten days after

this very agreement had been made and entered into by the parties, he says:

"Chicago, Illinois, Sept. 23d, 1861.

D. W. CROSS, Esq.

Dear Sir:—Yours of the 20th inst. was duly received in my absence, but owing to Mr. Ford being sick, could not be answered until to-day.

"*At first Mr. Maher seemed much dissatisfied with the arrangement, and said he would not stand it, nor allow the accounts to be collected; but after thinking the matter over, he came to the conclusion that it was about right, and told us to go ahead and do the best we could.* Mr. Quigg has been at work the entire past week, and it will take him all of this week to finish the book. I fear he can't do it this week. He says he found many errors, and expects to find more. As soon as he gets through we shall at once advise you, and also proceed to the collection as fast as we can. We got our German woman acquitted, in Indiana, whom we defended for the murder of her husband; the labor and excitement prostrated Mr. Ford, and he is now dangerously sick; but we hope he will recover. We shall do the best we can for you, and advise you from time to time. Would be pleased to hear from you often. Regards to Mr. Payne.

I remain yours truly,

W. W. DRUMMOND.

No sophistry can reconcile the testimony of the witness with this letter, which corroborates, if it were necessary, every word said by Mr. Quigg in respect to Mr. Maher. But the impeachment stops not here, for we have in the record three other letters from this same witness to Mr. Cross, wherein he refers to Mr. Maher in such a manner as to leave no doubt what his connection was with regard to the matter. Thus, in a letter dated Nov. 4th, 1861, he employs the following language:

" Chicago, Illinois, Nov. 4, 1861.

D. W. Cross, Esq., Cleveland, Ohio.

Dear Sir:—I had expected to send you a hundred or two of dollars before this; but I find that nearly every bill I present has either been paid in full to Mr. Kelly, or that there are large setoffs to the accounts, which, of course, causes much delay in settling. Mr. Quigg says that he never saw books so recklessly kept in his life. Of course you will get your money; but the greatest portion of it will come out of Hugh Maher."

See Rec., p. 65.

And, again, in a letter dated Nov. 26, 1861, which he concludes in these words: " *Mr. Maher is extremely* " *anxious to have the matter closed, so as to know how he* " *stands, and what to do with Kelly.*"

But were it not for the simple purpose of exhibiting, in the light of its own reflection, the character of this extraordinary witness, who disgraces the garb of an honorable profession, we should not have referred to these letters to show that the pretence of Mr. Hugh Maher has no foundation in fact; for we have, aside from these letters and the honest, straightforward testimony of Mr. Quigg, the most positive proof that he knew all about the agreement.

Mr. Ford, the partner of this remarkable witness, was examined as a witness on behalf of Mr. Maher, and when shown the agreement of September 13th, 1861, and asked who was present when it was executed and drawn, says:

" Well, sir, I do not know whether *I* was or not. I went out, and somebody else finished it. *I should think* " *that that is Mr. Drummond's writing.* I was not aware " until now, that I had anything to do with writing it. " That first page is in my handwriting, however. Well, sir, " there was an agreement that was *entered into, or talked* " *of being, in substance like this,* between Mr. Cross, Mr.

" Kelly, Mr. Drummond and myself. I was present myself " at the time, before I went out."

He is then asked: "Was Mr. Maher there?" and answers:

" *He was there in the forepart of the of the interview.* " He left before the contract was *consummated* between " Mr. Cross and Mr. Kelly."

He is next asked: "Was there any conversation " between Maher and Cross, and if so, what the same was."

He answers: " Yes, sir, some little conversation. Mr. " Maher, Mr. Cross and Mr. Kelly, *met at the office.* I was " at that time unacquainted with Mr. Cross, and was intro- " duced to him. I had some acquaintance with Mr. Maher " and Mr. Kelly, *and there was some conversation in regard* " *to the settling up of some coal account.* It seemed to be " an *agreement between them and my partner* that they " should meet there; that is, Mr. Cross, Mr. Maher and " Mr. Kelly; and Mr. Maher claimed that he had nothing to " do with any settlements; that he and Kelly had dissolved " partnership in the Spring previous, and that he had al- " ready made a contract with Mr. Cross, turning out the " fixtures, book account, &c. I do not know what other " things they mentioned in connection with the coal yard, " that I do not know the use of, nor understand. They " mentioned once a lot of things. *Mr. Cross' first reply* " *was, that he had taken them as collateral, and that he* " *wanted a guarantee from Mr. Maher.* Mr. Maher then " claimed that the agreement was, that he should be re- " leased on turning these out. Mr. Maher said that it was " the understanding that they were to be released, by a " subsequent contract that he was to be released. There " was some conversation between Mr. Maher and Mr. Cross, " as to how the books had been managed. I knew Mr.

" Payne, but I did not know that he had anything to do
" with the business. *Mr. Maher thought he ought to be re-*
" *leased. Mr. Cross thought they ought to be paid anyhow,*
" *and Mr. Maher left the room indignant, stating that he*
" *had no proposition to make, and would not do anything.*
" Afterwards a contract was drawn up, of which I believe
" that to be a copy, and signed by Kelly—'Kelly & Co.'"

This testimony, and the letters of the witness Drummond, written at a time when it is reasonable to conclude, he was conversant with the facts, and would remember them as well, if not better, than it is possible he could some years afterwards, is not only in perfect harmony with the testimony of Mr. Quigg, but fully explains the reason why Mr. Maher was so solicitious about the duties of Mr. Quigg, under the agreement of Sept. 13th, 1861.

Holding these facts in view, surely it will not be contended with any degree of seriousness, that, nevertheless, Mr. Maher was wholly ignorant of the existence of this agreement, or that he did not fully consent to, and confirm it. The proof is positive, not probable, and hence leads us to the consideration of the second disquisition of fact under which we propose to discuss the case.

II.

Did George H. Quigg, in pursuance of the agreement of September 13, 1861, *ascertain the amount due from Kelly & Co. to Crawford, Cross & Co?*

Law, says a great writer, *is founded on relations*, therefore it is necessary to a proper determination of this point, to understand the facts upon which it is predicated.

By reference to the agreement, it will be seen that the exact matter referred to, and to be determined by, Mr.

Quigg, was the *amount* due from Kelly & Co. to Crawford, Cross & Co., and that the means wherefrom the fact was to be ascertained, were the books of Kelly & Co. Therefore, the question now is, did Mr. Quigg proceed, in accordance with the power, in arriving at the award which he gave? The plaintiffs in error contend that he did not, while the defendants contend that he did; hence, the question at issue is purely a matter of fact, which can only be determined from the testimony.

By the eighth direct interrogatory propounded to Mr. Quigg, he is asked "to look at a paper shown him, marked "Exhibit 'B,' and to state what it is, and by whom made," and to this he answers:

"*It is a general balance of the books, at the time it was* "*taken off—in June*, 1862; *taken off by myself.*"

He is then asked, "was that, or not, your decision, *made* "*under the books*, of the amount due from Kelly & Co. to "Crawford, Cross & Co., made under the agreement "marked Exhibit 'A'?"

This question, although somewhat informal, presents in a manner not to be mistaken, and requires an answer to the precise issue under discussion.

Mr. Quigg answers it in these words:

"That was *a true balance* from the ledger, *which* I be- "lieved to be correct at the time it was made."

The defendants in error, not fully satisfied with this direct and pointed answer, but wishing to place the fact beyond cavil or construction, put the further question to the witness: "*Was this entirely made from the books of* "*Kelly & Co?*"

His answer is: "*The ledger exhibits every charge and* "*credit that leaves this balance.*"

Having thus shown, by testimony of the most positive and unequivocal character, that the award given by Mr.

Quigg was in strict pursuance of the *power*, it only remained for the defendants to show the amount thereof, and to that end they ask him this question (Int. 11):

"According to that paper, what was the amount due "from Kelly & Co. to Crawford, Cross & Co., at that "time?"

"Mr. Quigg answers: "The amount appears to be "$5,474.34." See Rec., p. 11.

But the plaintiffs in error say that, although it be true the ledger of Kelly & Co., *when written up*, "exhibits "every charge and credit that leaves this balance," still they contend that Mr. Quigg, in arriving at it, exceeded his authority, for the reason that if a balance had been struck from the books of Kelly & Co. *as they stood* at the time Mr. Quigg took hold of them, it would be much less than it now appears, after the books had been corrected, and all proper entries, and cross entries, made therein.

Wherefore, in cross-examination, they ask him this carefully worded question: "*Does the paper marked Exhibit* "'*B*,' in answer to the 8th direct interrogatory, show the "balance to Crawford, Cross & Co. from Kelly & Co., on "the 13th day of September, 1861, *as appeared from the* "*entries on the books of Kelly & Co. at that time*?" See Rec., p. 15, Cross Int. 7.

Mr. Quigg promptly answers: "It does not; several "*corrections* and *entries* having been made on the books "between that time and the date of said Exhibit."

This question, it will be observed, assumes that under the agreement, Mr. Quigg was bound to strike the balance from the books, as they stood on the date mentioned, without regard to their correctness, which is certainly a very extraordinary, if not a most unconscionable, position, and when stripped of the sophistry with which it is attempted to be clothed, may be thus resolved:

" We well knew, at the time of making this arrange-
" ment, that the general books of Kelly & Co. did not
" show the exact or true state of accounts. You did not
" know it. Therefore, we made and worded this agree
" ment as a trap, that you might fall into it?"

That this would be the inevitable corollary consequent of the construction attempted to be given to the agreement by the plaintiffs in error, cannot be doubted.

We apprehend, however, that the agreement, correctly interpreted, authorized Mr. Quigg, not only to correct all wrongful and unproper entries that were at that time, on the books of Kelly & Co., but, as well, to make all proper and necessary entries thereon, to a just and fair settlement between the parties.

The language of the agreement is: "*exact amount to be* " *ascertained from the books of Kelly & Co., by one George* " *H. Quigg, under the supervision of the parties to this* " *agreement*, and that the amount so found to be due and " owing *to be final.*"

This, and no more, Mr. Quigg did, aided by Mr. Hugh Maher, as he swears in answer to 2d cross-interrogatory:

" A good portion of these claims were against Kelly,
" individually. A lesser number were for offsets against
" Hugh Maher, which were allowed *by him* on a consider-
" ble portion which had been paid and not credited to
" the individuals making payments; and, also, a consider-
" able portion claimed by individuals for damages in fail-
" ure of contracts for delivery of coal. *The claims which*
" *were charged to Mr. Maher, were charged by his*
" *directions.*"

Thus it appears upon the record, in language too plain to be misunderstood, and too forcible to be misconstrued, that the plaintiff in error Hugh Maher, did, both by his

conduct and his acts, consent to and confirm the agreement of September 13th, 1861; and that Mr. Quigg not only acted in strict pursuance thereof, but that, in so doing, he proceeded under the immediate supervision, direction and control, of this very plaintiff in error, Hugh Maher.

But there is another view of the case which we must not forget to mention; one, too, so indelibly written on every page of this record, as well as in the entire conduct of the plaintiffs in error, and their abettors—Drummond & Ford, that the most casual observer cannot fail to perceive it, namely: a premeditated and cunningly devised scheme on the part of Maher and Drummond & Ford, to cheat and defraud the defendants in error out of their just claims against Kelly & Co.—a scheme which, however, like most iniquitous undertakings, soon exposed itself, as well as the character and daring recklessness of it concocters.

This view of the case being so manifest upon the record, we do not propose to discuss or follow it at great length, and will, therefore, dismiss it by a few references to the record itself.

It will, no doubt, be here urged by the plaintiffs in error, as it was in the court below, that the moneys collected by Drummond & Ford ought to be deducted, by the jury, from the finding of Mr. Quigg; and that the court specially erred in not granting a new trial on this ground. However correct this position might be in a proper case, it certainly comes with bad grace in the one under consideration.

In answer to the 13th direct interrogatory, Mr. Quigg says: "In regard to the accounts, Mr. Maher told me to "be *very particular*, and make memoranda of all mistakes "I should find. As to *collections*, *he repeated* the words to "use *all diligence*, so as to have sufficient to pay for *my* "*services*, and Drummond & Ford's *commissions*, and to

" *urge* on Drummond & Ford *to retain sufficient* in their " hands for that purpose."

And on being asked whether Mr. Maher made any request of him in regard to his work on the book, and if so, to state what he said. Mr. Quigg answers:

" *He* repeatedly told me to be careful and find out all " the errors, and make memorandums of them, and to at- " tend to making *all the collections possible, by suit or other-* " *wise*, so as to have money enough to pay *my salary*, and " the commissions of lawyers for collecting the same."

Is it not passing strange that Mr. Maher, whom, it is pretended, was wholly ignorant of even the existence of this agreement, until long after the award had been made, should thus, day after day, urge on Mr. Quigg, and request him to urge on Drummond & Ford, the necessity of collecting money enough to pay his own salary, and their commissions?

Why thus solicitous in the affairs of men whose duties he afterwards pretends to know nothing of, and to have no interest in?

Can he shield himself under the crooked, evasive, absurdly contradictory and palpably false, conduct of the witness Drummond? whose actions in this transaction are well and truly stated in the words of Mr. Justice BREWER, in a memorable case:

" Irregularities is too mild a term by which to chara- " terize these proceedings. *They are abuses in the face of* " *justice, and would be condemned everywhere.* It is an old " *maxim* that it is the very essence of fraud to attempt to " cover up fraud."

The jury and the court before whom this case was tried, passed upon this exact question, and gave it as their deliberate judgment that, not only was Mr. Maher cognizant of

the duties of Mr. Quigg under the agreement, but that his entire conduct showed a premeditated design and conspiracy, between him and Drummond & Ford, to arrange matters in such a way as to cheat and defraud Crawford, Cross & Co. out of their claim against him—the only responsible member of the firm of Kelly & Co.; and to that end that Drummond & Ford were to take upon themselves the business of managing the matter, lulling the suspicions of Crawford, Cross & Co., and do the swearing, while Maher was to remain quiescent, and reap the benefit.

"*Qui per alium, facit per seipsum facere videtur.*"

It is an ancient maxim that no man can take advantage of his own wrong.

The entire amount collected by Drummond & Ford and George H. Quigg, was between $1600 and $1700; and of this Mr. Quigg's services, at $100 per month, for nine months, from the middle of September, 1861, to the middle of June, 1862, amounted to $900, which left a balance of about $700; that went to Drummond & Ford for their services, under the direction of Mr. Maher himself.

"*Nemo ex alterius, facto praegravari lebet.*"

The facts of the case, as well as the law consequent thereof, were not only fully and fairly, but, characteristic of the learned Judge before whom the cause tried, scrupulously stated and laid down to the jury.

Notwithstanding all this, the plaintiffs in error say that the court below erred in not granting them a new trial. In other words, they now criticise the action of the court in the exercise of a sound legal discretion upon the entire facts of the case, and hence involves the consideration what that discretion is, as applicable to all cases.

In Graham on New Trials, p. 7, it is said by the learned author, that, "The action of the courts upon application

" for new trials, consists in a proper exercise of discretion, " not arbitrary, but legal, forming and moulding their " decisions in each case according to some precedent, or " upon its own peculiar circumstances, so as to best subserve " the purposes of substantial justice."

In the leading case of *Wood* v. *Gunston*, Sty, 462, GLYNN, C. J., says: " *It is in the discretion of the court, in some* " *cases*, to grant a new trial, but this must be a judicial, " not an arbitrary discretion."

" In granting new trials," say all the Justices in *Allen* v. *Peshall*, 2 Blacks., 1177, " *regard is to be had to the true* " *merits of the case.* If the issue was, as is supposed, the " defendant does not appear in such a light, in point of " real justice as to be entitled to a new trial."

In *Edmondson* v. *Machell*, 2 Term, Rep. 4, says ASHURST, J., " An application for a new trial, *is an application to* " *the dsscretion of the court, who ought to exercise that dis-* " *cretion in such a manner as will best answer the ends of* " *justice.*"

" And in *Estwick* v. *Coillaud*, 5 Term Rep., 425, BULLER, J., thus states the rule:

" On an application for a new trial, the only question is, " whether, *under all the circumstances of the case, the ver-* " *dict be, or be not, according to the justice of the case*, for " though the Judge may have made some little slip in his " directions to the jury, yet, if justice be done by the ver- " dict, *the court ought not to interfere to set it aside.*"

And again, in *Wilkinson* v. *Payne*, 4 Term Rep., 470, the same learned Judge holds the following language:

" If the verdict be *consistent with the justice, conscience* " *and equity of the case*, we ought not to grant a new " trial."

In speaking of the Duchess of Mazarine's case, 1 Salk., 116, this same great lawyer and profound jurist, says:

"There can be no doubt but that was the case of a "verdict against law, yet the court said, *as the justice and* "*conscience of the case were clearly with the verdict, they* "*would not interfere.*"

In *Cox* v. *Kitchen*, 1 Bos. & Pul., 339, the learned Judge had occasion to consider the same question, which he thus disposes of:

"The defense *is dishonest and unconscious, and on that* "*ground, I think the court ought not to interpose.*"

In *Hutchinson* v. *Piper*, 4 Taunt., 555, Mr. Justice GIBBS says:

"A motion for a new trial is not a matter of right."

And in *Rafael* v. *P. Verelst*, 2 Wm. Blacks. R., 987, Mr. Justice NARES says:

"*Everything that can be done should be done to remedy* "*an injury received;* and for that purpose, '*boni judicis* "*est ampliari jurisdictionem suam.*'"

But we need not consult the adjudicated cases of that land of laws, to show that it is not for every trifling technical error or misdirection that a court will grant a new trial. We find the rule laid down by the tribunals of our own land.

In *Gillett* v. *Sweat*, 1 Gil., 475, the court say: "A new "trial will not always be granted, even if the jury find "against the weight of evidence—against the instructions "of the court on a point of law, provided the court is satis-"fied that justice has been done."

And in *Greenup* v. *Stoker*, 3 Gil., 266, Judge PURPLE, universally acknowledged, not only as an accurate lawyer, but as an ornament to his profession, on a full review of

the authorities, holds the following language, which, we submit, is decisive of the case under discussion :

" From all these authorities, the rule may be easily de-
" duced, that a court will not grant a new trial, or reverse
" a judgment on error, because of the admission of im-
" proper, or the rejection of proper testimony, or for
" want of proper direction, or misdirection, of the Judge
" who tried the cause, provided the court can clearly see,
" by an inspection of the whole record, that justice has
" been done, and that the error complained of could not
" have affected the merits of the cause, or influenced the
" verdict of the jury."

Newkirk v. *Cone*, 18 Ills., 449.
Dishon v. *Schorr*, 19 Ills., 59.
Schwarz v. *Schwarz*, 26 Ills., 81.
Warren v. *Dickson*, 27 Ills., 115.

The refusal of the court below to grant a new trial is an exercise of discretion not subject of error.

5 Cranch, 11, 187.
1 Peters, 183.
3 Peters, 31.
8 Peters, 291.

We cannot conclude this head more appropriately, or better show what that discretion is, that courts of justice exercise in granting new trials, than by a quotation from the profoundest philosopher of antiquity :

" It is equity supplying the defects of strict legal justice,
" and deciding, as the legislator himself would have done,
" had the whole subject been in his contemplation ; for
" many particulars escape the notice of the legislator, and
" occasion the enactment of unjust laws ; much against his
" will ; *even with his will and consent, laws good in general,*
" *may be found unjust in particular cases ;* and it is al-

" together impossible to comprehend all that indefinite " variety of circumstances and conditions which, in each " particular application, would render law conformable to " the dictates of substantial justice."

Arist. Rhet., by Gillies, pp. 235, 236.

Well satisfied that this honorable court will not reverse, but affirm, this just judgment of the court below, we beg leave, in conclusion, specially to call the attention of the court to the propriety of awarding damages to the defendants in error, who are not only the victims of a bold attempt at a most outrageous fraud, but who have thus vexatiously been put to great cost and expense for the purpose of obtaining simple legal justice.

MONROE & MORRISON,

Brush & Munich. *Att'ys for Def'ts in Error.*